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REPORT.

REPORT

OF A

CASE OF LEGITIMACY,

UNDER A

PUTATIVE MARRIAGE,

TRIED BEFORE THE

SECOND DIVISION OF THE COURT OF SESSION

IN

FEBRUARY 1811.

BY

ROBERT BELL, Esq. Advocate.

EDINBURGH:
PRINTED FOR BELL & BRADFUTE, EDINBURGH;
AND BUTTERWORTH & SON, LONDON.

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P. Neill, Printer.

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NOTICE.

THE question argued in the case which forms the subject of the following Report, is one of some importance in Consistorial Law. It was not noticed in the Faculty Collection at the time when it occurred, owing to the Judges having been equally divided in opinion, and having ordered it to be further discussed: And one of the parties having died soon after this order was issued, the matter was settled extrajudicially. Besides that it is unusual to insert reports of undecided cases in the Faculty Collection, other considerations weighed with the Editor at that time in resolving not to publish it. He has been informed, however, by one of the Judges of the Consistorial Court, that a similar case has recently occurred, and that, even in the short time which has elapsed

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since it was so fully discussed, the existence of the case had been nearly forgotten, and the possibility of raising such a question denied. In these circumstances, he has deemed it his duty to comply with requests which have been made to him from various quarters, and to prepare the following Report of the case, from notes which he took in shorthand at the time when it was argued. And as, owing to its not having been decided, it can claim no authority as a precedent, but must derive its weight entirely from the merits of the arguments employed by the Bar, and the opinions delivered by the Court, he has thought it right to give these at as much length as his materials enabled him to do, instead of adopting the more abridged form which is generally employed in reporting the decisions of courts of law.

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REPORT.

THE question which was brought to issue in the case, of which this Report is now offered to the public, was, Whether, a lady, who was alleged to have been privately married, having afterwards, during the lifetime of her husband, contracted a second marriage, with a gentleman ignorant of the first, the child of that second marriage was, or was not, legitimate, on account of the *bona fides* or ignorance of its father?

No proof was taken of the averments of the parties, but the alleged private marriage of the lady was denied; and the facts which were *assumed*, by direction of the Court, for the purpose of raising the question of *law*, were, That a young lady, an heiress, was, while several years under the age of twenty-one, prevailed on by a gentleman, then also under age, to consent to a marriage, which, though the forms required by the Church were complied with, was private, in so far as it was concealed from the knowledge of her relations;—that she returned to her mother's house immediately after the ceremony was performed;—that her husband, who, very soon thereafter (or, according to the defender's statement, next day) left the kingdom, never appeared, or claimed her as his wife;—and, that the marriage never was communicated to any of her relations till after her death:

That a few years afterwards, the lady entered into a second marriage, with a gentleman who was entirely ignorant of the first;—that they immediately went home to her mother's house, where they resided (with the exception of a few months, during which they lived at the husband's seat in the country) till the following year, when she was delivered of a son, and that she died within a few days thereafter.

After her death, one of her brother's guardians raised the question, Whether her son, or her brother, was entitled to take up the succession to her estate?—but, before any decision was pronounced, the brother also died; and the case was then insisted in at the instance of a distant relation, who became pursuer of an action of declarator of nullity of marriage and bastardy, against the second husband and the child of that marriage. Both parties also purchased brieves from Chancery, in order to take up the succession both of the mother and her brother.

The competition of brieves was sisted by the Sheriff, till the question as to the validity of the second marriage should be determined; and, in the declarator, the Commissaries "sustained the pursuer's right to insist in the pre-"sent action, and ordain him to give in a condescendence "of the facts he avers and undertakes to prove, in support "of the conclusions of the libel."

The defender, who thought that a proof was incompetent, removed the cause into the Court of Session by advocation; and, on advising the bill with answers, the Lord Justice-Clerk (Hope) pronounced this interlocutor: "Having "considered the bill, answers, replies, and inferior court "process, appoints the parties to prepare, print, and put "into the boxes, on or before the second box-day in this "vacation, memorials, that the cause may be reported to "the Court; and, besides the points argued in these pa-"pers, recommends to the parties to consider and argue,

" how far this action can proceed with effect, without the " pursuer making the alleged first husband a party to the " action, inasmuch as any judgment in this cause cannot, " in reality, make the lady to have been the wife of that " first husband, unless he is competently made a party to " it; and it appears to the Lord Ordinary, that the cause " must now be judged exactly upon the same principles as " if she were still alive."

The case was argued in informations of considerable length; but as the authorities were again brought forward in the argument at the Bar, it is unnecessary to advert to them particularly in this place. The Court, on considering the papers, which were reported by Lord MEADOWBANK, in place of the Lord JUSTICE-CLERK, to the Second Division of the Court, stated very generally the light in which the case then appeared to them.

Lord GLENLEE was of opinion, that any person, in whose favour there was a natural presumption of legitimacy, was entitled to serve heir to his ancestor till the bastardy was declared.

He thought the other points, which were argued in the case, were very difficult, and especially as there was no explicit authority in any of the Scotch law-books, to serve as a guide.

He rather inclined to think, that, if there was a total ignorance on the part of either of the parents, as to a prior marriage of the other, the children would be legitimate. But, though such was his opinion at the time, his mind, upon the whole, was so little made up, that, if he was to give an opinion again, a few days afterwards, it might possibly be the other way.

As to the fact of the second husband's *bona fides*, though

it was denied by the pursuer, he was satisfied, from the whole complexion of the case, that it was well founded.

Lord ROBERTSON complained of the short notice upon which he was called on to decide the case. He stated the proceedings before the Commissaries, and said, that, till he had seen the condescendence which they had ordered, he could not give any opinion on the effect of the husband's *bona fides*. He was inclined, therefore, to sustain the pursuer's title; but was quite clear, that the *onus probandi* lay upon him, not only as to the existence of the first marriage, but also as to the second husband's *bona* or *mala fides*, as *bona fides* must be presumed in the mean time.

Lord JUSTICE-CLERK said, that it was a difficult question, and one which, he hoped, would rarely occur; and as to which, it was not wonderful that there was no direct authority in the Scotch law. The first question was, Whether the *bona fides* of one or both of the parents, in a question of bastardy, would legitimize the children? If it would, there would be no occasion to give a judgment with regard to the state of the fact; and he was for remitting to the Commissaries to receive a condescendence on that point. He thought that the proof of this was incumbent on the pursuer, because the marriage must be presumed to have been legal, till the reverse was established. That this would be a difficult task for the pursuer, and the more so, that the agent for the original pursuer evidently was of an opposite opinion, when he wrote the letter, announcing the commencement of the action, which was conceived in terms of which it was impossible to speak without horror. He could not call for any proof from the defender in such a case, and the Court could not permit the pursuer to prove any thing but the *mala fides* of the defender, till they

should have decided the effect of his *bona fides*, in the event of his *mala fides* not being proved.

Lord ROBERTSON wished it to be clearly understood, that he had not made up his mind on that question.

Lord GLENLEE concurred in the suggestion of Lord JUSTICE-CLERK.

Lord MEADOWBANK thought it quite competent to commence by finding a series of general propositions in point of law, and said that the Court might then, with the aid of those findings, be able more distinctly to instruct the Commissaries how to proceed, 1*st*, As to calling the alleged first husband; 2*d*, As to the personal objections * pleaded by the defender; 3*d*, As to the effect of the defender's *bona fides*.

He thought nothing of the preliminary objection to the action. It was not necessary, possible, nor proper to summon the first husband, nor did he think there was occasion even to give him notice of what was going on.

He was of opinion, that, by law, the *bona fides* of either of the parents was sufficient to legitimize the children, and that this legitimation extended *ad omnia*; for he had no idea whatever of the possibility of entertaining the distinction argued by the pursuer (who had suggested that the child might be legitimate in one respect and not in another), and thought that it would be most dangerous to admit it. He said that legitimation by letters from the Crown was a thing of a very different kind, and that the Crown, as the fountain of honour, was very naturally per-

* The personal objections were not noticed in the hearing, and therefore it has been thought unnecessary to detail what they were.

mitted to issue letters of legitimation, which, except in giving the power of testing, had merely an honorary effect, but that it would not do to limit any other sort of legitimation in the same manner.

Neither had he any idea that a child could be put in the anomalous situation of being legitimate as to the succession of the innocent and deceived father, and illegitimate as to the mother, even if the story told by the pursuer were true. He thought this the most absurd of all possible notions, and said, that if the father, who was *in bona fide*, was entitled to have his son declared legitimate as to himself, he was also entitled to have him legitimate in every other point of view.

With regard to the former judgments, he said, that where no consummation of a first marriage had taken place, no lawyer had ever entertained a doubt that the children of the second would be legitimate. In Cameron's case *, where a young girl had been entrapped into a marriage of which she immediately repented, and where no consummation followed, the Court went the length of finding that even she herself was not bound by the marriage. In the case before the Court, he thought there was strong evidence that no consummation had taken place. There was no allusion to any thing of that kind in the correspondence of the first husband, nor to the gross infidelity of which the lady must have been guilty in endeavouring to be free, if that had been the case: and he did not think it possible that he should have refrained from alluding to it, if it had been true, when he was so anxious (as his letters shewed him to have been), to prevent her from entering into the second marriage. Upon this point there was an essential flaw in the pursuer's statements. He did not allege relevantly to entitle him to go on in his declarator, when he did not say there was a marriage,

* Select Decisions, No. 109.

followed by consummation; and, till he did so, he should not be allowed to put in a condescendence.

Craig evidently, his Lordship observed, entertained the opinion which he had now expressed. Lord Stair also sanctioned that opinion, from the manner in which he mentioned Craig and the Canonists, without contradicting them: and Erskine seemed to have been rather of the same opinion as to the effect of *bona fides*.

His Lordship concluded by saying, that he apprehended that there were strong reasons, both in principle and in expediency, for coming to that opinion, which seemed to him to be the sound and solid one,—that where a marriage was regular, and followed by public cohabitation, without any challenge from the friends and relations, and where there could be no *mala fides* satisfactorily proved, the Court ought to hold that marriage good, whatever might have been the real situation of either of the individuals.

He thought that the point appealed from in the case of Campbell*, was wrong decided by the Court; but the question of *bona fides* was not appealed from in that case, and was right decided, in so far as effect was given to that plea; and he wished the Court to pronounce a specific interlocutor, in the first place, declaring this to be the law, and instructing the Commissaries to receive a condescendence, if the pursuer chose to give one, as to what he alleged regarding the *mala fides* of the defender.

Of this date (24th May 1810), the Lord Ordinary pronounced the following interlocutor:—"Having considered the bill, with the memorials for the parties, and "advised with the Lords, before deciding on the merits "of the points at issue, appoints the respondent to prepare, print, and box a special condescendence of what

* Falconer, Vol. i. No. 204.

" he avers and offers to prove as to the consummation of " the alleged marriage betwixt ——— and her first hus- " band, and the knowledge of that marriage by ——— " the second husband, when he solemnized a marriage, and " cohabited with that lady, and became the father of the " defender; and that in ten days."

The pursuer petitioned against this interlocutor, and prayed the Court to remit the cause *simpliciter* to the Commissaries. Answers were ordered to be lodged; and, on again advising the cause, their Lordships adhered.

A Condescendence was then lodged, in which the pursuer very imperfectly obeyed the order to condescend on the second husband's *mala fides*, or knowledge of the first marriage, and did not offer any proof at all of the consummation of that first marriage.

Answers were given in for the defenders, and at advising these papers (Dec. 8. 1810),

Lord MEADOWBANK adverted to the last-mentioned circumstance, and said, that the pursuer had been twice ordered to speak to it, and should be called on to say positively, whether he meant to make any allegation on the subject.

Lord JUSTICE-CLERK was of the same opinion. He did not doubt that the pursuer had applied to the first husband, and should have been able to say whether it was so or not; the more so, as that circumstance might be very material to shew, whether the first marriage was a real *bona fide* one, or only a pretence.

Mr GILLIES for the pursuer said, that he was not in a condition to make any such averment.

Mr Clerk for the defenders moved the Court to repel the condescendence as insufficient. He would not ask them to pronounce a special interlocutor on the relevancy, according to the old practice, for he thought it a bad one; but he did not think the condescendence sufficient to entitle the pursuer to speak to the relevancy at all; and it was one on which no argument could establish his right to go to proof.

Lord Meadowbank thought it right not to pronounce special interlocutors of relevancy; but that there should be a general relevancy in the condescendence, and that the Court should not allow parties to go into a useless proof.

Lord Justice-Clerk said, that the eleventh article of the condescendence, which averred the prior knowledge of the second husband, was not sufficiently pointed; and that every other part of it might be proved or admitted, without affecting his opinion, which was, that the *bona fides* of the second husband would secure the legitimacy of his child.

Lord Newton did not think the *bona fides* of one parent could have any such effect; and doubted, whether that of both would have been sufficient.

Lord Meadowbank said, the condescendence should be amended; and the pursuer should say positively, whether he alleged that the defender knew of the first marriage, and not leave it to be inferred from circumstances.

Mr Gillies said, that the pursuer would not undertake to bring direct evidence on that point.

The Court pronounced this interlocutor. The "Lords

" having resumed consideration of this petition for ——— " ——— (the pursuer), with answers thereto, condescendence for the petitioner, and answers; before answer, appoint counsel for the parties to be heard in their own presence on the question, Whether, supposing a prior marriage were proved to have been entered into between " ——————— (the deceased), and ——————— the first " husband, the allegation of the ignorance of the second " husband of such marriage, at the time when a marriage " was solemnized between him and the deceased, would be " relevant to establish the legitimacy of the defender (the " child of the second marriage); and reserve to the petitioner, in case of any circumstances occurring to endanger the loss of evidence in the third article of his condescendence, to apply to the Commissaries by incidental petition, for leave to adduce evidence in support of said article, to lie *in retentis*, subject to the order of the Court."

On 7th February 1811, the case was put up for the hearing ordered by this interlocutor; and was opened by

Mr JEFFREY for the pursuer, who said:—I attend your Lordships on the part of the pursuer of this action; and I do not think it necessary, as opening counsel in the case, to detain you with any detail of the circumstances, both because your Lordships know them already, and because they are not necessary for the decision of the point of law which you have ordered to be argued in your presence.

Lord NEWTON.—I did not hear them before. I was not present at all the former discussions.

Mr JEFFREY.—I am pursuing an action of declarator of bastardy, on the ground, That the mother of the defender had been married to another person before she married the

defender's father; and that her first husband was still alive at the time of that second marriage. The effect of the first marriage upon the legitimacy of the defender is denied, on the pretence that his father was ignorant of it at the time of his marriage; and the *mala fides* of the father is affirmed on our side of the bar. But, before admitting the parties to a proof of their respective averments, the Court has ordered counsel to be heard on the point, Whether the ignorance of the defender's father, which is assumed for the present, is sufficient to establish the legitimacy of the child.

In endeavouring to lead your Lordships to the principles on which this question must be determined, I must be allowed to take it for granted that the matter is still open for your decision; and, therefore, though the point of precedent and authority is pleaded in a very high tone by the defenders, I shall hold, that the Court, in ordering the present hearing, meant to say, that the authorities already produced by them, were not sufficient to make out their defence; and that you are willing to take the assistance of what lights may be given you by the bar, in disposing of a question now to be determined for the first time.

But as almost the whole of the case on the side of the defenders, is rested on certain authorities, which they maintain have settled the question, it is necessary for me to begin by noticing these authorities: For, at least, if I cannot satisfy your Lordships (which I don't think I can) that they are altogether unworthy of notice, I conceive I shall be able to shew, that they are not sufficiently strong and binding, to settle the question before you at the present day, by the mere force of precedent.

I conceive, then, my Lords, that there is no decision of this, or of any other court, which absolutely determines the question at issue; and I am sure that there is no general understanding, either of the bar or of the public, in favour of the

defenders. On the contrary, I appeal to all who now hear me, whether the proposition, when first started by the defenders, That a child, in the situation in which this boy stands, was entitled to the *status* and situation of a legitimate child, did not startle and astonish, and almost excite a kind of horror; so monstrous, I am sure, it must at first view have appeared to every person who heard it propounded. I think I shall be able to shew your Lordships, that, notwithstanding certain vague and general dicta, which I admit may be found in favour of the defender's position, the question is still open for the determination of this Court; and that, notwithstanding the immense importance of this case to the law of marriage, your Lordships are now, for the first time, to fix and settle the principles of law by which it must be ruled.

Most of the authorities which have been detailed to your Lordships on the part of the defenders, undoubtedly rest ultimately on certain dicta in the Canon law; and I do not mean to dispute, that, according to that law, their plea is a good one. I admit, that they have the authority of the Canonists altogether in their favour,—whatever the value of that authority may amount to. But, if that be the only support which they have,—if their reasoning is altogether derived from that system of jurisprudence, I conceive that it will give your Lordships very little trouble to determine the present case.

That law has been described with great justice in one of the papers in this case, in the language of Mr Erskine *, as being "compounded on the one hand of beautiful prin-"ciples of equity, chiefly borrowed from the Roman law; "and, on the other hand, of a collection of absurd canons "and rescripts, extolling church authority above the high-

* Ersk. b. i. tit. I. sect. 28.

"est secular powers." From this cause, among others, the Canon law has never been recognised as being of paramount authority, in this or in any other country, which was not *de facto* subjected to the temporal, as well as the spiritual government of the Roman See, in all matters whatsoever; and it would be most unwise to do so, when the very accurate description given of it by Mr Cranstoun* is recollected, That "it professed to take cognisance of the thoughts, "as well as the actions of men. Attending more to the mo-"tives than to the nature or consequences of what they did, "the Canonists attempted to regulate their system by a "reference to that system of ultimate retribution, which "every enlightened legislator has held will be far better "regulated, if it is left entirely to the wisdom of Provi-"dence in the next world, than by any assistance which hu-"man laws may attempt to give to it in this." And, accordingly, the Canon law was very soon found to be of difficult and dangerous application in civil courts; and, as I have said, it never was adopted entire in any country, not completely subject to the temporal authority of the Pope.

In particular, I think myself entitled to affirm, that the Canon law never was the law of *this* country; and that it was merely used, like any other foreign system of laws, not by any means as an authority, but as furnishing a source for equitable and reasonable ideas on undetermined points of law,—for those equitable considerations which would have been deemed by our own courts to be reasonable and proper, whether they had occurred to themselves, or been stated as arguments by any person, without the sanction of any authority.

With regard to the subject of the present hearing, wherein the canonists have declared in favour of the legitimacy

* Mr Cranstoun wrote the Information for the Pursuer.

of children born under such circumstances, on the ground of the *bona fides* of one of the parents, your Lordships will observe, that it was not one of those " beautiful principles " of equity" which they " borrowed from the Roman law," but just one of those canons or rescripts delivered by the Popes, by which they endeavoured to exalt their own authority above all secular power. The particular doctrine now in question was undoubtedly promulgated in the first instance, in consequence of the Pope for the time having taken up the matter on special or equitable views, as applied to a particular case, which happened to be before him; where he was most evidently actuated by feelings of compassion to one of the parties. It is reported in these words *; " Ex tenore literarum vestrarum nobis innotuit, quod cum " G viduam hæreditatem quondam R mariti sui sibi, et pu- " pillo filio suo restitui postularet, pars adversa petitionem " ejus excluderet, pro eo, quod R maritum ipsius viduæ " de adulterio genitum asserebat: Proponens quod dicti R " Pater vivente uxore legitima, quandam aliam maritiam " nomine superduxit, ex qua præfatum R maritum ipsius " viduæ generavit. E contra vero pars viduæ respondе- " bat, quod cum maritia præfata nesciens quod dicti R pa- " ter aliam haberet uxorem cum eo in facie ecclesiæ con- " traxisset, ejus filius, quem suscepit ab eo legitimus debe- " bat habere, cum non debeant illegitimi reputari, qui de " adultera conscientia non nascuntur. Cumque super hoc " diutius fuisset in vestra præsentia litigatum, et nonnul- " lorum prudentum sententia, quorum consilium requisis- " tis, in hoc invicem discordaret, se. duxistis ap. consulen- " dam. Nos igitur intelligentes, quod pater prædicti R " matrem ipsius in faciem ecclesiæ ignaram, quod ipse aliam " sibi matrimonialiter copulasset, duxerit in uxorem; et

* Decretal. lib. 4. tit. 17. cap. 14.

" dum ipsa conjux ipsius legitima putaretur, dictum R
" suscepit ex eadem, in favorem prolis potius declinamus,
" memoratum R legitimum reputantes."

Your Lordships see here, that the original maxim, which is now held out as sufficient to unsettle the whole analogy of the law of Scotland, had so far divided the canonists themselves, that they could come to no decision upon it, but were obliged to refer the matter to the ultimate and infallible tribunal of the Pope. Nevertheless, I will not dispute that this principle was acquiesced in from that time forward. No contradictory rescript was issued, and it came to be embodied in the laws of the canonists. But the original introduction of it into that law, and the motives which appear to have actuated Innocent III., by whom it was delivered, both of which I have now endeavoured to explain, are well worthy of your Lordships' consideration.

But if this were merely held out to your Lordships as a maxim of the Canon law,—as a maxim fit to be adopted in this country, solely on the authority of that law,—I would think that I had already said more than enough on the subject. Such authorities as these are not like decisions of our own courts. They can be attended to by your Lordships, in so far only as they contain good arguments, and must be weighed like any other arguments by their own merit. The Canon law is not an authority in this, or in any other Protestant country; and your Lordships will not hold an argument to be unanswerable, merely because it has been inserted among the dicta of that law; particularly in a case where it was evidently introduced as matter of favour, where the rescript is that of a Pope by no means remarkable either for learning or ability, and where it does not stand upon any one rational or general principle whatever.

But I am told, in the next place, that this doctrine of Pope Innocent III., was long since adopted and sanctioned by the writers on our own law; and if it were true that they had so determined the matter on due consideration, and in a solemn and deliberate manner, I freely admit, that it would be too much for me now to ask a contrary judgment from your Lordships, the very first time that it is stated to you that this long received opinion is ill founded.

But I am humbly to contend, that no such opinion has been given by any of our writers. All of them take notice of the doctrine indeed; but it is in a historical point of view merely: Not one of them says, in direct terms, that it is the law of Scotland, or that he thinks it ought to be so: and this gives me a kind of indirect authority for saying, that they could not have actually considered it in that light.

And, first, with regard to the authority of Sir Thomas Craig, a passage was quoted in the printed Memorial for the defenders *, in which he says, "Postulat locus, ut dica-"mus qui sint bastardi, qui legitimi. Et quanquam hæc "quæstio hujus instituti non sit propria, sed judicis eccle-"siastici; ut tamen junioribus aliquatenus consulam, quam "brevissime rem totam perstringam."—"Advertendum "est, totam hanc quæstionen HODIE ex jure Pontificio pen-"dere, cum sit quæstio, quæ proprie ad conscientiam per-"tineat. Ex quo jure, multi etiam in matrimonio nati non "sunt legitimi: multi, nondum solemnizato matrimonio, "legitimi."

The defenders then remarked, that Craig begins with laying down a preliminary distinction between marriage contracted *de jure*, and marriage contracted *de facto*; by the last of which he meant a marriage where some lawful

* Lib. ii. Dieg. 18. sect. 17. "De his qui impediunt successionem."

impediment to its validity does really exist, such as the prior marriage of one of the parties to a different person. And after stating the law, as to the subsistence of the marriage itself, where such impediments exist, he proceeds in these words *: "Sed ubi ab initio matrimonium non sta- "bat, nec stare poterat, propter impedimenta quæ propo- "sui; aut ea impedimenta nota erant utrique parti aut al- "terutri: si utrique, filii sunt illegitimi; quod si alteri "tantum, alterius bona fides, licet non sufficiat ad con- "firmandum et stabiliendum matrimonium, sufficit tamen "ad legitimationem prolis: nam jura Pontificia favent "magis legitimationi liberorum ex hoc matrimonio, quam "ipsis conjugibus, adeo ut multa habeantur in jure pon- "tificio quæ matrimonium dirimant, non tamen ut liberi "sint illegitimi faciant. Quod si, constante adhuc tali "matrimonio, quod de facto celebratum est, notitia impedi- "menti ad utrumque conjugem pervenerit, statim se a "mutua cohabitatione separare debent; et, si qui postea "inter eos producantur liberi, illegitimi sive bastardi nas- "cuntur, manentibus in suo legitimorum statu eis qui "ante notitiam concepti sunt."

He continues the same subject through the next two sections, and then (I pray your Lordships' particular attention to it) he observes †, "Hæc sunt quæ de bastardis "tam jure Civili, quam Canonico, QUO HODIE UTIMUR, præ- "scribuntur."

Now, I observe upon these passages, that this author nowhere states that such had been declared by any court to be the law of Scotland; or that there had been any usage or any general understanding in this country, tending to shew that such was the law. I farther submit to your Lordships, that it is very doubtful from these passages, whether it was even the opinion of Craig himself, that it

* Lib. ii. Dieg. 18. sect. 18. † Sect. 21.

ought to be held as part of the law of Scotland. By the expression, *Jure Canonico, quo hodie utimur*, I think he meant nothing else than "the Canon law as it is still re-"ceived;"—that is, as it is received in those countries which continue to be governed by the Canon law, not that it is, or ever was, the law of Scotland; and his remark, I conceive, referred merely to the alteration which was made on the laws of those countries, by the Rescript of Pope Innocent III., and imported only that they still continue to obey that rescript.

There is no part in all these passages, where he says that this rescript is part of the law of Scotland; and yet, in almost every passage on other matters, he begins by saying that so and so is the law of this country. I will not trouble your Lordships with many authorities as to that, because you must be aware of it, and, indeed, it is impossible to open the book without perceiving it. (Mr JEFFREY here read some examples of Craig's frequent use of the words "*apud nos*," where the law of Scotland was meant to be particularized, and similar expressions.)

This interpretation of the quotations from Craig, appears to me to be quite obvious, from the very statement of the words which he employs in allusion to the law of this country, in the whole of his work. He states such and such matters as having been adopted from the Canon law, and afterwards received as a part of the law of this country; but he does not say that we receive every dictum of it which is contained even in his own work. And the long and particular statement which he gives of the Canon law upon this point, is merely offered as a kind of genealogy of our common law, without its having been his intention to assert that every thing therein mentioned formed part of it, or was received among us.

But even if your Lordships were to differ from me upon this point, and to hold that Sir Thomas Craig, in the

passages which I have now quoted, and the others referred to by the defenders, did intend to state that the rescript of Innocent III. had been adopted into, and formed part of, the common law of Scotland, I would submit, that this should not by any means be sufficient to authorise your Lordships to give the doctrine so laid down an unqualified reception. The history of Sir Thomas is well known. He was educated abroad, at a time when the system of the law of Scotland was by no means mature. It is not at all wonderful, therefore, that, with his foreign education and foreign habits, he should have attempted to supply any deficiencies in the laws of his own country, by a reference to the laws of other nations on the Continent; and, in general, I believe it will be admitted, that, at this distance of time, Sir Thomas Craig's unsupported assertion does not afford sufficient authority for fixing any point in the law of Scotland.

But, if your Lordships have no ground to hold, from the authority of Craig (as I trust I have succeeded in shewing), that any such practice prevailed in Scotland at or before his time, or that there was any understanding in favour of such a law among the legal authorities of that time; you certainly will now find, from the opinion of subsequent writers of just as high authority, and of more knowledge of the law of Scotland, that it has not, since then, been introduced or known as a rule of our law.

If there had been any such law, or any such usage, the memory of them could not have been lost between the time of Craig and that of Lord Stair; and it is impossible that Lord Stair should have omitted to say so, if there had been either the one or the other. But in what terms does he speak of this doctrine of the Canonists? He mentions it merely as the opinion of Craig and the Canonists, but he does not say that it was the law of Scotland; nor does he even appear to think that Craig meant to call it so himself. He

says * there are " bastards, whose parents were married, and " in capable degrees, yet the marriage was inconsistent, " because of some impediment; as if either party were mar- " ried before, and the other spouse in life, whether that " were solemnly or privately by promise of marriage and " copulation following; in which last case, if the impe- " diment be secret, and not known to both parties." Here your Lordships see it is stated as being only where the first marriage is *private*, or not *in facie ecclesiæ*, that the children of the second are even said to be legitimate. He proceeds: " Craig † observeth, *as his own opinion, and the* " *opinion of the Canonists*, that the said impediment, " though it be sufficient to annul the marriage, yet not to " take away the legitimation of the children procreated du- " ring the *bona fides* of any of the parents, before know- " ledge of that impediment."

It is argued from this passage by the defenders, that, because Lord Stair, in mentioning the opinions of Craig and the Canonists, does not say that they are not the law of Scotland, he must have been of the same opinion himself; and it has been observed, that the passage would be incomplete, if it did not contain an expression of his own opinion. But your Lordships will see that this is unfounded, if you attend to the decided difference between the two parts of the passage. In the first, he gives as positive law, what he says with regard to the impediments to marriage, and their effect upon the legitimacy of the children. In the second, he expressly mentions the exception of *bona fides* as having been stated by Craig as the opinion of himself and the opinion of the Canonists; which is clearly treating the two subjects in a very different manner. I think it is most evident that Lord Stair did not here give his own opinion,

* B. iii. tit. 3. sect. 42.

† B. ii. tit. 18., sect. 18. and 19.

nor did he mean to say that the opinion of Craig was well founded. And he at least has thereby intimated, that, whatever it ought to be, it had not, in his time, become the law of Scotland.

The opinion of Lord Stair, as having lived much nearer the time when Craig wrote, is certainly entitled to more weight, with respect to the meaning of that author, and the existing rule of the law of Scotland, than any opinion that can now be formed upon that part of the subject; and I desire my friends on the other side to look over his whole book, and to say if they can find any other instance where an acknowledged point of the law of Scotland is mentioned merely in this historical manner, by saying that it is or was the opinion of some other writer or of some other system of law. His Lordship never mentions any point of our own law in that manner, even when it is also a branch of some other law, or has been introduced into our law from some other: For instance, take his manner of treating the subjects of terce, courtesy, representation, &c.

But, on the other hand, was there any thing unnatural or incongruous in a learned man, like Lord Stair, when writing a book upon the law of his country, adding to that law, where an opportunity presented itself, some notice or intimation of other systems or opinions with which he was acquainted? And when he does give such additional information upon any particular point, and does not say any thing more as to its being also our own law, is it to be believed, that he therefore meant to say that it was our own law, or to assent to the opinions of other lawyers, without expressly saying that he did so? I think we ought to draw just an opposite conclusion; and accordingly, in looking over his book, many instances will be found in which similar references are made to other laws, where it is quite clear that he did not mean to say they were the law

of Scotland. For instance, where he says *, "Amongst the "Romans, an ordinary and inferior magistrate, and his "heirs, were liable *pro dolo et lata culpa*, if the caution taken "by them were not found sufficient, but not the greater "magistrates, as the prætor or presidents, who, through "the eminency of their office, could not so particularly "know, but were necessitate to trust to the relation of "others."

Lord JUSTICE-CLERK.—That is an unlucky instance. I rather take it to be law yet. Our Clerks of the Bills, for example, are liable for taking insufficient caution, but we are not.

Mr JEFFREY.—I rather imagine *magistrates* is used in a different sense from a clerk of Court. But, at any rate, as your Lordships are perfectly aware of the fact, and as I have not made any reference to particular passages, I need not detain you by looking them up now. It is undoubtedly quite common with Lord Stair to give these matters of historical information.

But, if there is nothing parallel or analogous to it in the law of Scotland, or in the principles and doctrines of that law, can it ever be argued, that, on all these points of voluntary and unnecessary reference, Lord Stair meant to say that they were also, or that they should also be, received as doctrines of the law of Scotland? A reference to any doctrine of a foreign system of law, without a distinct and specific approbation of it, never can be held as implying that that foreign doctrine has been recognised among us. At the very utmost, it must mean that the law of this country has not yet been declared upon the subject.

What proves that it is quite impossible that this should

* B. i. tit. 6. sect. 11.

have been the law of Scotland in the time of Lord Stair, is the manner in which the same subject has been treated by our later authors, who must have said that it *was* our law, if it had really been the case.

Lord Bankton, who, I admit, does give an opinion against me, does it, however, in such a manner as to shew that he had no Scotch authority for doing so. He says *, "The Ca- "non law is much regarded with us in matters of marriage, "and therefore, *it may be justly thought* that the *bona fides* "of either of the parties will be sufficient for the legitimacy "of either of the children. Such *bona fides* will be the more "easily presumed, if the marriage was publicly solemnized, "than when it was clandestine. *The learned Craig is of* "*this opinion*, and that *mala fides* cannot be induced but "by sentence of the proper court, annulling the marriage; "and as this is likewise the opinion of other feudists, *it is* "*highly probable the same rule will be followed with us.*"

This passage shews completely that Lord Bankton knew, and he says so, that the matter was perfectly unsettled in the law of Scotland; and all he meant to say was, that Craig, the Canonists, and himself, thought that it ought to be law; and that it would probably be found so if it should ever be tried.

Mr Erskine, just in the same way, mentions it as an undecided point †: "But if either of the parties were, at "the time of the marriage, ignorant of the prior marriage, "the *bona fides* of that party, though it could not make "the marriage lawful, HAD, *by the Canon law*, the effect "of legitimating the issue, provided the marriage, labour- "ing under the nullity, had been solemnized in the face "of the Church. Craig *is of opinion*, that such of the "children as are procreated after both parties have come to "the knowledge of the fact which made the marriage un-

* B. i. tit. 5. sect. 51.

† B. i. tit. 6. sect. 51.

" lawful, are to be reputed bastards ; but that the ignorance " of any one of them *ought to support* the legitimacy of " the children begotten prior to the decree by which it is " declared void ; because till then none of the spouses ought " to decline the conjugal duties."

Here, too, it is plain that Erskine merely states the whole matter as the opinion of others, and not as his own ; and even in the use of the word *had*, when speaking of the Canon law, as opposed to *has*, it must be presumed that he meant to guard against any idea that we had actually adopted it. The mode of expression which he has used through the whole of this passage, never could have been chosen, if he had believed this to be the law of Scotland.

I think myself entitled, therefore, to affirm, that this author cannot be quoted as any authority in favour of the pursuers. He neither says that this doctrine was part of the law of Scotland, nor that it ought to be the law, nor even that he thought it to be a just and rational opinion. If Lord Stair and Mr Erskine had thought that the opinion was well founded, they would have said so ;—they would have mentioned the persons whom they describe as entertaining it, as doing so on good grounds,—or as having good reason for it ; or would have used some such expression ; and your Lordships can only impute the manner in which they have mentioned them, and their not having directly contradicted them, to that sort of politeness which one author is very apt to observe towards another, where he has no direct authority to put against him. You must therefore hold, that all our institutional writers are against the doctrine, Lord Bankton alone excepted, whose authority, when opposed, —perhaps even when only not contradicted—by any of the others, you cannot fail duly to appreciate.

This is the whole amount and force of the authorities which have yet been urged against the plea which I main-

tain; and it appears to me to be completely demonstrable, that all that can be drawn from them is, that none of them can be quoted in this Court, as being of sufficient weight of themselves, to shew that the proposition advanced by the defenders is, or ought to be, the law of Scotland.

As to the only two decided cases which have been referred to on the other side of the bar, I hardly think that it is necessary for me to say any thing more upon them, than what is already before your Lordships in the printed papers.

In the case of Cochran against Campbell, as your Lordships are there told, the question was, Whether a person challenging a marriage, upon the ground of bigamy, was not barred from bringing a proof of her averment? Your Lordships' predecessors were of opinion that she was, and refused to allow her a proof of her averment; but the House of Lords reversed that judgment; and a proof of the fact was allowed, in which the pursuer ultimately failed.

The question now under consideration was evidently not involved in that judgment in any respect. But the defenders have laid hold of a passage in the report by Falconer, on which they found, in support of their plea. It is, "Such of the Lords as were for the interlocutor of the "Lord Ordinary (Arniston, who had refused to allow a "proof of the facts), declared, that, whatever was the issue "of this question, the daughter would be legitimate from "the mother's *bona fides*." From this the defenders have argued, that the Court were unanimously of that opinion. But really the matter appears to me in a very different light. Your Lordships know how very natural it is in any judges, when deciding a point of law against a fair and *bona fide* litigant, to state their opinion as gently as they can, and to throw in any softening expressions which may occur to them. The majority might refuse to allow a

proof, on the ground of personal exception, without holding any such opinion as this. On the contrary, feelings of compassion, or of supposed equity, might have made them refuse a proof, just because their opinion was the very reverse; and because they wished to prevent Mrs Campbell from being subjected to the risk. But the minority might very naturally throw it out as a sort of mitigation of the different judgment which they were inclined to pronounce. The question was not before the Court,—it was not argued by either of the parties; and the opinion which has been preserved, can be considered as nothing else than the mere *obiter dictum* of a minority, perhaps rashly thrown out without consideration, and therefore it can be entitled to no attention.

The case of Napier, I believe, the defenders themselves will admit to be totally inapplicable. In that case, the only question was, Whether there had been two marriages or not, and it was determined that there had been only one?

These are all the authorities which have been founded on by the defenders.

On our side of the question we do not pretend to have any direct authority to produce. I submit that I have said enough to shew that the authorities of the other party are not sufficient to determine the question. And in this dearth of more direct authority which I admit, I conceive that the matter must be decided, now for the first time, on analogous considerations, drawn from the general principles of the law of Scotland.

But, before I proceed to that branch of my subject, it is proper that I should mention that there are authorities which the defenders have not yet pleaded much upon in their favour. I allude to the law of France. But that part of their law seems to have been adopted by them from the Canon law. And, in this point of view, I must again sug-

gest to your Lordships, that the rules of the Canon law, or of the law of France, or of any other foreign system of law, are not authorities properly so called, when pleaded upon in this Court. They are merely reasons or arguments for your consideration, and which you ought to take into view, and to consider whether they ought to be received in this country or not; as fountains in which those natural principles of justice and equity may be found, which would present themselves to your Lordships at any rate, and which, if they are just and equitable, you will receive; but which you will consider as of no weight or authority whatever, if they are not.

Now, in this view of the case,—giving to the defenders all the assistance which they can derive either from the Canon law, or from the law of France,—we are, on the other hand, entitled to make the same use of the Civil law, and of the law of England.

It is a remarkable circumstance, that, amidst the vast multiplicity of questions which have occurred, and been decided by the Roman lawyers, so very important a question as the present does not appear ever to have received a direct decision; but, notwithstanding thereof, it occurs to us that the authority of the Civil law is decisive in our favour.

As an example of the rules of the Civil law, your Lordships will recollect that of a marriage which was null, on account of the servile condition of one of the parties. If a free person married a slave, while ignorant of that circumstance, still the children were illegitimate, notwithstanding the most perfect *bona fides*: "Si ignorans statum Erotis ut "liberum duxisti, et dotem dedisti, isque postea servus est "judicatus; dotem ex peculio recipies; et si quid præterea "eum tibi debuisse apparuerit. Filii autem tui, ut ex libera "nati, incerto tamen patre, spurii ingenui intelliguntur *."

* L. 3, Cod. Solut. Mat. quemad.

A marriage of that sort was not even permitted to presume paternity. On the contrary, it is stated expressly that they shall be *spurii*, just as if the father had been altogether unknown.

There is another law in these terms*; "Divus Marcus "et Lucius, Imperatores, Flaviæ Tertulliæ per Mensorem "libertum, ita rescripserunt: Movemur et temporis diu- "turnitate, quo ignara juris in matrimonio avunculi tui "fuisti, et quod ab avia tua collocata es, et numero libe- "rorum vestrorum: idcirco (que) cum hæc omnia in unum "concurrunt, confirmamus statum liberorum vestrorum in "eo matrimonio quæsitorum, quod ante annos quadraginta "contractum est, perinde atque si legitime concepti fuis- "sent."

This law shews distinctly that the ignorance of the common course of law, and the long time which had elapsed, were not of themselves enough, but that it required a special rescript of the Emperor to legitimate the children. And there are other passages to the same purpose in the Code.

Another example may be drawn from the situation of Governors of Provinces, who were prohibited from marrying any woman within the limits of the province; and it was settled, that the children should not be legitimate, even when a marriage took place under ignorance of the wife living within the province.

Here I request your Lordships to observe, that the opinion of Craig, which I formerly spoke to, is made to depend on the foundation not only of the Canon law, but of the Civil law also; but I think I have clearly established, that, at any rate, it was not the Civil law; and therefore, the opinion of Craig is founded to the extent of one-half at least, and, in point of authority, its better half, on a com-

* L. 57, ff. de Rit. Nupt.

plete mistake; for he says, "Hæc sunt de bastardis *tam* "*jure Civili*, quam *Canonico*," &c.; and we have no right or ground to presume that he would have entertained the opinion which he did, if he had been aware of his mistake as to the Civil law.

On the contrary, it is much more probable that he would not. And this mistake, even on the supposition that he was aware of the question never having occurred in our own country, accounts completely for the manner in which he has treated the subject. For he must have been a man of more than ordinary boldness who could have ventured, in the days of Sir Thomas Craig, to set up his own opinion, however strong his conviction of its correctness might be, in opposition to the dicta of those two laws united, when they were both of them confessedly of much higher weight and authority in the minds of mankind than any of their warmest admirers would now lay claim to.

We cannot, therefore, give the least weight to the opinion of Sir Thomas Craig; for it is plain that it might have been very different, had it not been for this mistake; nor can we even presume, in those circumstances, that it really was his fair and unbiassed opinion.

But, though I think those views are of importance to a full understanding of the case, on the grounds which I have stated; yet I conceive, that, on many accounts, the law of England is much more entitled to attention than either of those which have been founded on by the defenders. Those laws were framed by a wise and enlightened people of the same race with ourselves. They are remarkable in an eminent degree for the equitable and liberal principles which pervade the whole of them: and it is a Protestant country like our own, and consequently more entitled to regard when not contradictory to our own law, than the law of any number of Catholic States, which may have been swayed to depart from the principles of equity, from the feelings of

mankind, and even from the genius of those very laws themselves, by an undue reverence and obedience to the authority of the Pope.

That your Lordships may understand what the law of England says on this subject, I shall read just two passages from a well known author. In Bacon's Abridgment *, it is said, "If a marriage is made null by divorce, "the issue is illegitimate; as if the parties be divorced for "precontract, consanguinity, affinity, or frigidity; for, "where the marriage is nullified, it is a copulation without marriage, and consequently the issue are bastards; "*and it is the same by our law, whether they have notice "or not of the consanguinity*, because we look no farther "*than the dissolution.*"

"If a man marry his cousin within the degrees, or his "sister, the issue got between them is not a bastard till "there be a divorce; for, though such a marriage be unlawful, yet it remains good till sentence of divorce be "pronounced, and, consequently, the issue must be esteemed legitimate till such a dissolution."

This last passage, with one quoted from the Treatise of Law and Equity, p. 439, in the Memorial for the defenders, that, "if two are divorced for consanguinity, if they were "ignorant of the consanguinity, the issue shall be legitimate," seem, at first view, to throw a little difficulty upon the question; but I shall now endeavour to shew your Lordships, that they are quite consistent with the doctrine which I am maintaining.

By the law of England, there is a distinction taken between such marriages as are null *ab initio*, and such as are only voidable; and, consequently, many marriages which are prohibited by the law subsist, and are held to be legal marriages, till such time as they are set aside by decree of

* Vol. i. p. 513.

divorce; and the meaning and origin of this distinction will be found, by going back before the period of the Reformation, when the dispensing power of the Popes was acknowledged. It is undoubted,—every man who has looked into the history of those times must be aware,—that it was in the power of the Pope to dispense with the prohibitions against marrying relations, and that marriages contracted under such dispensations were held to be good. But there were certain marriages for which even the Pope could grant no dispensation, such as having two wives or two husbands at one time. In those cases where he could grant dispensations,—as it was always possible till the last that a dispensation might be obtained,—the marriages were held to be not null *ab initio*, but only voidable; and, therefore, they were attended with all the legal consequences of marriage, till such time as decree of divorce was pronounced. Where the Pope could not grant dispensations, on the other hand, no decree of divorce was required. And, I am now to shew your Lordships, that, even in those cases where such a sentence was necessary, still the ignorance of either of the parties made no difference on the case, in so far as it was null and not voidable *. "If a man and a woman "marry under the age of consent, they are husband and "wife till disagreement. So, if a man marry a woman pre-"contracted, they are husband and wife till divorced. So, "if he marry within the Levitical degrees. So, if a priest "had married before the statute 32d HENRY VIII. 38. "So, if there be a marriage by duresse. So, if they are "divorced only *a mensa et thoro*. *But a marriage, when a "former husband or wife is alive, is null, as well by the "spiritual as by the common law, and they are not husband "and wife* de facto. So, if a nun had married, for she was "under a vow of chastity, and, therefore, her marriage was "void. Or a monk."

* Comyn, vol. ii. p. 75.

Lord Justice-Clerk.—Don't you think that that distinction looks very like one of those subtleties in the law of England, which we are not very fond of adopting?

Mr Jeffrey.—The subtlety appears to me, my Lord, to lie the other way. I hold that the Court should not require any divorce to set aside this marriage, but that it was *ab initio* void and null. In that view, it is surely a subtlety to say that the child can be legitimate. But, as a marriage between relations within the prohibited degrees is good till divorce, it is no inconsistency to say that the children of such a marriage shall be legitimate till then.

So far, therefore, as the law of England goes, I conceive that it is altogether in favour of my client: And I flatter myself, that I shall not be thought irregular, if, in closing my appeal to that law, I refer to an opinion which I have obtained from one of the ablest lawyers now at the English bar. I do not by any means put it in as an authority, but only as part of my speech.

(Mr Jeffrey here read a case which had been laid before Sir Samuel Romilly, and which both the Court and the defenders seemed to admit to be accurately stated. The answer of Sir Samuel was to this effect: That it was not incumbent on the person challenging such a marriage to prove *mala fides* on either part; that, even although it were established that one of the parties was ignorant of the prior marriage of the other, still the issue of such second marriage would be illegitimate; that he knew no authorities to that effect, and did not believe that any could be found in the law of England; for the matter was too clear ever to have been doubted of or called in question.) *

* If this Case and Opinion can be procured, they will be given in the Appendix.

Your Lordships see, therefore, what would be the decision of the law of England,—of the most enlightened country on the face of the globe; and I submit it as sufficient to outweigh a whole host of Canonists and Feudists; and as far more worthy of attention and consideration from our Courts than the dicta of any system of laws but our own.

I conceive, my Lords, that I have now completely got rid of all the appeals to authority which have been made on the other side of the Bar, which might have apparently tied up your Lordships' hands, and prevented you from listening to the argument which I am to submit to you on the principles of the law of Scotland, divested of those imaginary trammels; and which, I think, are fully sufficient to establish that my client must be successful in the plea which he maintains.

On that ground, in entering on which I certainly feel in a much higher degree the difficulty and responsibility which attaches to me, in handling a matter so fundamentally and deeply important to the law of Scotland, than in what has yet passed, I shall endeavour to make my argument as short as it can possibly be, consistent with accuracy, as I rely very much on the ability and learning of my friend who is to follow on my side of the Bar.

I think, then, that I shall not be contradicted in stating it as a fundamental proposition, That in this, and in all other Christian countries, the legitimacy or illegitimacy of children depends on the state and situation of their parents; and that no children can claim the status of legitimacy, by any other means than through a Marriage on the part of their parents.

In all the writers that I have looked into, the legitimacy of the children is laid down as depending on the marriage of their parents. I believe no case, and no form whatever,

can be pointed out, in which children in any Christian country have ever yet claimed the full benefit of legitimacy in any other way. In all countries reference is had to such a state, though I admit, that, in different countries, different methods are taken to establish the fact.

Accordingly, this is exactly the argument maintained on the other side of the Bar. They do not deny that marriage between the parents is necessary to establish legitimacy in the children. On the contrary, they state, and found their claim in this action altogether upon the law of marriage;—on a marriage, which they admit may be null in other respects, but which they nevertheless insist ought to be supported to the effect of legitimating the issue of that marriage.

This being the state of the argument on both sides,—that all legitimacy is dependent on a marriage of some kind or other between individuals,—I may assume, that legitimacy with us is not to be considered as any thing relating to the public at large, but only to the state and situation of the parents. The next legal principle which I found upon is, that no man can have two lawful wives at one and the same time. Polygamy is altogether reprobated and punished by our law. It is not merely considered as a crime, but it is declared to be impossible by the law of the country. It is not said that a second marriage during the subsistence of the first is good till divorce, but voidable on challenge. But it is laid down as *de facto* and completely null. Our law does not recognise it in any shape. The intercourse between such persons is not legal. They are not husband and wife, but persons living in an unlawful connexion together.

If these two principles are admitted, as I conceive they must be admitted, the conclusion seems to follow immediately and necessarily, and cannot be evaded or got the

better of by the plea of *bona fides*, or by any other argument that the ingenuity of the defenders can possibly introduce into the question. If legitimacy requires a marriage, in order to constitute and support it, and if a second marriage during the subsistence of a first is illegal and prohibited, and *ab initio* null; if, in short, it is no marriage, then it must follow that the issue of such second marriage must be illegitimate.

The argument maintained by the defenders does not dispute these principles. My learned friends do not deny either of them. All that they say is, that, because one of the parties was ignorant, or says he was ignorant, of the prior marriage, the posterior marriage will be effectual, and should be sustained to the effect, and no more, of bestowing the status of legitimacy on the children; and that, out of favour to the *bona fides* of one of the parents, the children ought to be found capable of succession. But surely this is carrying the matter much farther than it ever can be carried, consistently with the acknowledged principles of the jurisprudence of Scotland. And I will now proceed to inquire, What is the law of this country, with respect to that doctrine of the effect of *bona fides* which the defenders are now endeavouring to carry to such an extraordinary length, which I shall do, by pointing out the distinction between those cases, in which *bona fides* is effectual to support the right of the party pleading it, and those in which it is not.

The first class of cases in which it appears that *bona fides* is allowed to form a topic upon which to support a right, otherwise objectionable, is that great class in which *bona fides* in one of the parties is met by a corresponding *mala fides* on the other side; as, for instance, all cases of contracts, where, though the right may not be substantially good or binding in law, yet the *mala fides* of the opposite party bars him *personali exceptione* from objecting to the in-

formality of the right. In that class of cases, the law by no means operates on the ground of *bona fides* alone, but only by permitting the *bona fides* to give to the person who is in that situation, a pretence or authority for founding on the personal objection arising from the *mala fides* of the other party.

Thus, where both parties are *certantes de damno vitando*, there is no relief, unless one of the parties is actually *in mala fide*. I shall only refer to a few cases on this head, to shew how early the principle which I have stated was recognized in our law. A factor's commission was recalled,—goods were sent to him a few days afterwards,—his cautioner *was not liable*, although no intimation had been made that the factory had been recalled *. The sum in a woman's contract of marriage was vitiated and diminished after marriage without her consent,—found, that creditors of the husband, who had adjudged, and who had trusted that the contract was as it appeared, could derive no advantage thereby to the prejudice of the wife †.

I have merely stated those cases to exhaust the ground, but I shall not detain your Lordships longer with them, as I am aware that they are not perfectly in point.

The next description of cases in which *bona fides* is sustained alone, and without any *mala fides* on the other part, is radically different from the present. It is sustained in cases where a party makes a purchase *bona fide*, from a person holding a full and complete legal right to dispone at the time. If, for any reason, the disponer's right is thereafter set aside, the right of the *bona fide* purchaser will be sustained. And, in a late case, the right of the *bona fide* purchaser was sustained, while that of the seller was reduced.

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* *Hare.* March 1682 † June 11. 1670, *Stair.*

In the same manner, the onerous indorsee of a bill of exchange is entitled to pursue for payment, on the principle of *bona fides*, though the person from whom he received it may have paid no value for it.

I admit, that, in all that class of cases, *bona fides*, coupled with onerosity and a colourable title, is sufficient to uphold and support the derivative right, even where the original right is reduced.

It might be imagined, at first view, that the present case comes under that class of cases on account of the onerosity, if such it may be called, on the part of the child. I shall find another opportunity of speaking to that part of my case. But, in the mean time, your Lordships will observe, that this ground of *bona fides* is only good when the party who grants the conveyance or indorses the bill has a good and inherent title to do so at the time when he does it; and the reduction, of which I shall speak afterwards, will not affect the right of the acquirer. But, on the other hand, when he has no such inherent title, the derivative right is set aside, as well as the original one.

In the case, for instance, which I mentioned just now, of a *bona fide* purchase, a person who serves heir to the proper party, and whose service contains no blunder on the face of it, is entitled to dispone the estate; and the right of an onerous purchaser will be sustained, whatever may afterwards become of the disponer's title. But if he serves heir to a wrong party, or if there is any nullity in the service, then the right of the buyer will fall, along with that of the disponer.

In the same way, if a bill of exchange is a forgery, however much the holder may be *in bona fide*, he will not be entitled to recover. Nor in the case of a bill originally granted for a game debt.

Now, to apply these principles to my case. Your Lord-

ships will observe, that my plea here is, not that the marriage was voidable, in which case, some argument might be maintained on the ground of *bona fides*,—though even then unsuccessfully, for reasons which I shall presently come to,—but that it was null *ab initio*,—that it never was a marriage at all. The *bona fides*, therefore, might be complete, and yet there were no fundamental grounds upon which the parents of this child could convey to him any right or title to the status of legitimacy. Just in the same way as a man may imagine that he has a good and accurate service to his ancestor, and that he has served heir to the proper party; yet, if he is mistaken in either of these points, his own right falls, notwithstanding the most unquestionable *bona fides*. He may imagine that he is conveying a good title to a purchaser; he may be in complete *bona fide*, and yet the subsidiary right will be good for nothing.

For a mistake of that kind there is no remedy; and neither can there be any remedy in the present case.

There is a case reported by Kilkerran*, in which this principle is most clearly and completely brought out, and I request your Lordships to attend to his remarks on this subject. "1*st*, The maxim that *resoluto jure dantis resolvitur et accipientis*, holds only in three cases: "1*mo*, In extinguishable rights: 2*do*, Where the third "party prevailing against the author has the preferable "feudal right: or, 3*tio*, Where the author's right is intrinsically null, against which the records cannot save; "as where his service happens to be erroneous. But the "present case is different, where the feudal right was habilely vested in the author, and only subject to a personal challenge, for then the purchaser, on the faith of

* Heron *v.* Stewart, *p.* 389.

" the record, is safe. And as to the act 1621, though it is " true that the acquirer is *particeps fraudis*, where he sees " the defect of his author's right, yet that was what the " pursuer could not see in this case; for though she saw " her author's right from his grandfather to be a gratui- " tous settlement of succession, yet she could not see any " thing on record to hinder the grandfather to make that " settlement, as he stood in the absolute right by the char- " ter and infeftment 1703, and that his obligation in the " contract of marriage 1668 was a latent deed, which she " nor no purchaser could know of."

The last class of cases is that under the analogy of which the present question most plainly falls.

Wherever a person's right is defective, and voidable in consequence of the defect, all that he does in the character of proprietor before it is reduced, is effectual and valid to the *bona fide* parties with whom he deals. But if the right of the acquirer is null *ab initio*, no degree of onerosity or *bona fides*, of hardship, loss, or damage, can enable your Lordships to do any thing whatever for the relief of the acquirer. The mere opinion of the parties that there was a good right, can have no effect on the decision of the question.

If the question here was as to the existence of the marriage, or as, by the law of England, to the voidability or nullity of it, there can be no doubt that it would be found to be null.

If a declarator or decree of divorce were necessary as the means of dissolving such a marriage as this, the marriage must have been dissolved, and the parties divested of the state of married persons, before any effect could be produced in the condition of the children, and they would till then be of necessity legitimate. But where the marriage was null *ab initio*,—where there was no marriage at

all,—I submit it to your Lordships as being perfectly clear, that there can be no legal principle or analogy whatever, which can entitle you to hold that there was any legitimacy in the case.

But it is true, that, even in the last class of cases to which I have been speaking, *bona fides* has some consequences, in so far as the *bona fide* possessor is not bound to repeat the *fructus percepti et consumpti.*

I do not think it will be an easy matter to bring the present case under any analogy of that kind. A person in that situation only retains what he has consumed. He is not bound to repeat what he has *bona fide* destroyed or used, but his privilege goes no farther. So now, as the true right is brought forward, it puts an end to the bad one; the *bona fide* possessor is obliged to surrender his possession; all that his *bona fides* gives him right to, is what has no longer an existence, by enabling him to object to any retrospect.

Now, in applying that rule to this question about the legitimacy of the defender, what are your Lordships to do? Are you to hold that the legitimacy is a right which is past or consumed? If he has had any benefit during the time that our challenge has been delayed, that is the whole extent to which this plea can go; for as soon as the true right comes upon the field, the false one immediately vanishes away and disappears.

Suppose a bond to be null, the *bona fide* possessor is entitled to the whole interest which he has received and consumed, but he is not entitled to any more interest.

I now submit to your Lordships, that these are the whole cases of the operation of the *bona fides* of any parties in our law, (perhaps not very well classed, but under the general and vague description which I have ventured to give), which can be held as at all applicable to, or

touching on, the present question. As to those cases which I do hold to touch the matter, I apprehend that I have already sufficiently explained to your Lordships all that has occurred to me to be necessary; and, to say all in one word, we say, that *bona fides* gives right in one class of cases, to prevent a man, who is *in mala fide, personali objectione*, from pleading against it. In another, it gives right to *fructus bona fide percepti et consumpti*, but to nothing more. In all cases it has been shewn, that *bona fides*, however strong, cannot create or give any right whatever. It may, and does, keep alive what has been struck with a mortal wound, but it cannot raise the dead, nor bring into existence what did not exist before. It cannot give the status of legitimacy to persons whose parents, in the eye of law, were never married, when it is undoubted law, that legitimacy must and does depend, in every case, on one sort of marriage or another.

Having mentioned those cases in which *bona fides* is sustained, I need not detain your Lordships by any further examination of those in which it is not.

Attempts to settle Scotch heritage by means of English deeds, is a case in which *bona fides* has no operation. There was, for instance, the case of Colonel Kyd in 1797, as to an Englishman sending his money to this country, which the trustees vested on heritable securities, without any directions to that effect,—and they went to the heir-at-law, in the face of a will, by the Colonel, giving the whole to his own natural son. There can be no doubt whatever, that there was the most perfect *bona fides* in that case, on the part both of the Colonel and his son; but the Court was not moved by any such consideration; and I do not believe that any of the very able counsel who argued the case, ever thought for a moment of stating such a plea. Many points of law were argued on that occasion; but this gene-

ral and sweeping argument was never even thought of, and yet the son was not only *in bona fide*, but the heir was *certans de lucro captando*. And if we are to be forced to make out a case of hardship, in order to complete the analogy, I shall suppose that Colonel Kyd had had a lawful family; that he had provided his lawful son elsewhere in as much as he meant to give him; and that he had wished to provide his lawful daughters in all the money which was invested in Scotch heritable bonds, and that he had failed in doing so from the very same reason. That would have been a hardship. But would this Court have listened to any plea of hardship, or to any *bona fides*, in such a case? Will any thing of that kind alter the law of the country? Will it make what is null and void, good and substantial? It may bar a challenge in some other cases; but will it in any case raise up that which never had a legal existence?

Now, your Lordships will consider how the present case stands. It falls clearly within that general description of being a right founded on a transaction, which outwardly bore the appearance of being a good and legal transaction, and such as would have founded the right; but which, in point of fact, turned out to be no transaction at all,—for it is clear, and admitted, that the marriage was null altogether. It is admitted in this case, that the *bona fides* is not enough to remove all objections, as in a question with the party himself who pleads the *bona fides*. It is not said that the *bona fides* of the father will validate the marriage as to him; but it is maintained that the father's *bona fides* will have this wonderful effect in favour of the child.

But the *bona fides* here is not on the part of the child. He can have no *bona fides*. Children of any marriage whatever, of bad marriages as well as of good, or of no marriages at all, are all equally *in bona fide*. If a child is born

of a bad or of an incestuous marriage, he has just so much the greater claim to compassion, but he has no pretence to *bona fides*. It is the *bona fides* of one of the parents that is founded upon here.

Now, what is this alleged *bona fides* to do? What is the effect which the present defence is endeavouring to give it? The defenders say, that it is only to establish the legitimacy of the child. I say, that that is just maintaining that it can make a marriage *quoad hunc effectum*. They cannot get the status of legitimacy *per saltum*. They must come at it through the medium of marriage. They say there was a marriage, because the father and the public believed that there was a marriage when the child was begotten; and that, though null in other respects, that marriage was good to the effect of legitimating the child. In this way they make legitimacy an accessary to the marriage, and nothing else. They can come at their object in no other way. And, is it possible that the accessary should be sustained, and found to be effectual, when the principal is destroyed?

My principle is admitted here, that that which is null cannot be made otherwise than null by any *bona fides*, because it is admitted that the marriage itself is not good. Now, if the marriage is null, as between the parties themselves, in spite of the *bona fides* of one of them,—can the *bona fides* afterwards revive, to the effect of rendering it not null, for the sake of another generation altogether, which was no party either to the *bona fides* of the one parent, or the *mala fides* of the other?

The *bona fides* pleaded on here, is not that of him who is to get the benefit of it, but of other parties, who are admitted not to be able to claim any thing through their own *bona fides*. I submit to your Lordships, that this would

be such an application of the principle, as would be without any analogy whatever in the law of this country.

I think I remember something having been formerly said in this case, as if they were going to found on such marriages to a certain extent in other respects, though not *in toto*, so as to give husbands the courtesy, and widows the terce.

Lord Justice-Clerk.—The widow has the terce by law.

Mr Jeffrey.—Yes, till her right is set aside. But if a man cannot have two lawful wives, I do not see on what principle he can have two lawful widows. A man in this way might marry thirty wives all round the country, and entitle them all to terces. But that is not the point before your Lordships, and therefore I will not trouble you about it; but surely it would be holding out a bounty to polygamy, if your Lordships were to endure such an argument as this. It is admitted that the marriage in this case is utterly null and void. But it is a mere speculative nullity which they acknowledge; for the moment you come to any of the legal consequences of nullity, then they maintain that it is not null *quoad hunc;* and that the mere *bona fides* completely preserves the rights of all the parties concerned.

This is really carrying the doctrine of *bona fides* a most unexampled and unwarrantable length. I say that no man is entitled to be *in bona fide* upon such a subject. He is bound to make every inquiry into a matter of so much consequence as his marriage. He must be presumed to know every thing about it. And I doubt much if, in any circumstances, he is entitled to found upon his *bona fides*, however complete it may be.

But it is only half a *bona fides* that the parties found

upon in this case. One of the parents was confessedly *in mala fide*. In the case which was quoted from the Roman law, and on which the opinion of Craig, if it was his opinion, and all the authorities of the defender are founded, both parties were *in bona fide*.

If there is any sense in the rules of the law with respect to bastardy, which I am rather inclined to think there is not;—If there is any propriety or any good reason for proscribing them, as in a certain respect infamous, and in changing the ordinary rules of succession with regard to them;—surely the very same principle ought to find its way where both of the parents are not innocent; they ought to inherit the odium of the one of their parents along with the *bona fides* of the other. Why, if the child is to be entitled to succeed, on the one hand, out of favour to the *bona fides* of the husband, ought it not to be found precluded from succeeding, on account of the *mala fides* of the wife? This remark would, at the very worst view of my case, just bring the whole matter to a balance, and prevent the defender from deriving any benefit from the doctrine of *bona fides*, even if all the other arguments which I have submitted to your Lordships were destitute of weight and authority.

It occurs to me also, on this point, to observe, that the common law did perceive this consequence of the doctrine of *bona fides*. I have already remarked their endeavours after that purity of discrimination, that just and accurate balance of rewards and punishments (apportioned more to the motives than to the actions of men) in this world, which can only be accomplished in the next. And, in point of fact, it endeavoured to do something of that kind even in those sorts of questions. It made the child lawful in respect of the *bona fides*; but the guilty parent was not entitled to any of the benefits of having him a lawful child. He was

bound to all the duties, but not entitled to any of the benefits of lawful parents. It might succeed to him; but he could not succeed to it, nor was it in any one respect subject to the *patria potestas*.

There is, in the last place, a peculiarity in the present case, to which I must now direct your Lordships' attention. By the rules of our law, the doctrine of *bona fides* only operates through and against the person who is *in mala fide*, or with whom the contract *in bona fide* was entered into; and in no case is it supported against third parties, or other rights, which are not concerned in the matter at all. Now, I say here, that my client is entitled to succeed to the estate of the deceased parent of this defender, as her nearest lawful heir; and that he who had nothing to do with any of her marriages, cannot be affected by any *bona fides* of another party, with whom he had no connection. And he is as much entitled to complain, and to insist that the common law of the country shall not be altered and set aside to his prejudice, in order to give the status of legitimacy to another party, as that child's own lawful mother, or sister, if it had one, would be entitled to do; for, though different in degree, the principle is precisely the same.

Suppose this lady had had a family of daughters by her first husband, and that they would have had right to succeed to their mother, and that there were no competitors, but a son of a second null and putative marriage. Would your Lordships have allowed lawful children to be cut out of their succession in such a case as that? By no means. There is no instance of any degree of *bona fides* affecting the rights of third parties in this manner.

My client is a collateral relation, no doubt; but what has that to do with the merits of the case? He would be the heir in this case, if there had been no lawful children

of Mrs ——— and would have been entitled to the possession of the estate which was left by that person.

This view is of itself sufficient to decide the question; and nothing in the least degree parallel to it occurs in that favourable description of cases, where *bona fides* may be pleaded against persons who were not originally concerned in the matter. Taking into view all these circumstances which peculiarly distinguish this case, I submit to your Lordships that there can be no doubt at all in the decision of it.

I have now only a few words to add on the last view of the case which has occurred to us, but which, according to our views of the law, it is quite redundant and superfluous to enlarge upon.

I hold it to be perfectly clear, from what I have already said, that *bona fides*, in any degree, or to any extent, cannot produce any thing out of nothing, and that what was null *ab initio*, can have no legal consequences whatever.

But even if I had failed in establishing this proposition, still the question of equity is one which it is not for the interests of the defenders to touch; for a due consideration of the mischiefs which may result from your Lordships giving way to their argument, is, of itself, a sufficient reason for deciding the question in favour of my client, even were there no principles of strict law upon which the case could be decided.

In entering upon this part of the case, I am enabled, from my own feelings of the hardship attending the defender's case, and from the strong leaning which I confess myself to have towards his side of the case on motives of favour and compassion, to judge of the effect which must have been produced on the minds of your Lordships by commiseration for his unhappy situation, and also by a consideration of all the complicated circumstances which

will be pleaded for him;—the youth of the mother, her death, the ignorance of the father, and the innocence and unprotected situation of the child.

All these considerations must be attended with great effect in this case, if it is possible that your Lordships can be actuated by feelings of individual hardship in the determination of a question of great and fundamental importance to the law of the country.

In considering how your Lordships are to determine such a case as this, you ought to take it up as one altogether impersonal. Or, if you are to extend your views any further, you must not confine them to the individual case now before you, but to the general effects which the whole of the country, subject to your jurisdiction, may feel from the judgment which you are about to pronounce. And, I am sure it is hardly necessary for me to detain you, by demonstrating that the principle which is contended for by the defenders, is one which is fraught with the most incalculable danger to the interests of the country at large.

In considering the matter in this point of view, your Lordships must not permit yourselves to be carried away by those circumstances which are peculiar to the present case, but which, nevertheless, are not sufficient to distinguish it from other cases of double marriages, which may and must occur when the practice is declared to be lawful. Your Lordships cannot, in deciding this case, permit yourselves to suppose, that you are only affording relief to a few persons who are carried away in the thoughtlessness and levity of early youth, to enter into marriages with persons whom their better reason would have disapproved of, and of which they immediately afterwards repent and wish to annul, or of persons who marry in mere frolic, and never imagine that they are really married, and both of whom may have refused to complete the marriage by consumma-

tion, or to homologate it in any other way. You would not be applying a corrective to errors such as these. If the practice is once found to be legal, the number of cases which will come before you, of persons who enter into the first marriage with a pre-intention of following it up by a second to some other person, will infinitely exceed those of the first description.

Besides the encouragement that such a doctrine would give to that sort of marriage, your Lordships will consider also the strong temptation that would be held out to every person, (and there are many in that situation), who may be anxious to be succeeded by heirs of his own body, and not by collateral relations, whenever he despairs of having children by his wife, to go and marry another. I will venture to say, that from that time very few instances would occur of estates descending to collateral relations.

In another point of view also, your Lordships must not look to the case now before you, as if it stood quite alone. Here the first marriage was the concealed one. But in most of the cases which would occur, if the doctrine of the defender was once established to be law, the second marriage would be the concealed one; and surely it is unnecessary to enlarge on the dangerous consequences which that would produce.

What would prevent any man who took a prejudice against his lawful heir, or even who, without any such prejudice, might have a very natural desire to see an heir of his own body, and who despaired of having children by his wife, from attempting to cut his heir out of his rightful succession, by means of a concealed marriage with another woman?

Worse consequences might even happen than that. Many men have only female children, with an anxious desire for sons; and I am afraid that some men are unprin-

cipled enough to go and cut out their own daughters from their legitimate succession in the very same manner.

And what difficulty could there be in accomplishing such plans as these? What would there be to hinder a man from going to another part of the country? He would find no difficulty at all in finding a *bona fide* woman perfectly willing to marry him, especially if he carried money in his pocket; or he might find many women who would be very ready to marry him without making any inquiries at all about the matter; and yet it would be very difficult, if not impossible, to prove, at the distance of many years, that she was *in mala fide*.

But the matter need not stop here, for there is no limit to the principle, and a man might go on marrying wife after wife till he found one who would bring him a son.

A still stronger case may be put than any of these. A man may imagine that his wife is past child-bearing, and, in the hope of having a child of his own body, may go and make one of these *bona fide* marriages. He may have a son by that second marriage, and then he may come back to his first wife, and, contrary to his expectation, he may have a son by her. Which of these children would your Lordships find to be entitled to the estate? Is it possible that you can give a decision which may lead to such consequences as these?

Even this is not the worst case which may be figured. A man with a family of daughters may fail in all his attempts to procure a son. He may return in despair to his first wife, the mother of daughters. What is to hinder one of these *bona fide* wives, whom he has married, to produce a son thereafter by another man?—and (for it is not by any means necessary that he should leave the country) it would be his legitimate child; and in this manner the offspring of a *bona fide* street-walker might come in and carry off the estate from his own lawful daughters.

Are these extravagant cases? Are there no men in want of male-heirs? Are there no men in want of children of their own body? Are there no men who, even from the worst of motives, would seize every opportunity of disappointing their legitimate heirs? And are not these considerations, of what must inevitably result from the adoption of the plea maintained by the defenders, sufficient to overpower every feeling of individual equity, which may be followed in the end with such dreadful and alarming consequences?

It is impossible that your Lordships, with such dangers before your eyes, should sustain this defence. It is impossible that you should pronounce any judgment which may have such an effect upon lawful children; which might plunge a man's lawful daughters into an infinitely worse and more pitiable condition than that of children who are born to be bastards, and continue such to the end of their lives.

These are a few only of the evils to which the principles laid down, and the plea maintained on the other side of the Bar, inevitably lead. And are your Lordships prepared to grant a license to any practice fraught with such enormous dangers, on any pretence of *bona fides*, or any humane and general feeling for the legitimacy of the child? And I shall only further entreat your Lordships to remark, that these figurative cases, which I have put, are of far more likely occurrence than that case which is at present before you: the one does not appear to have occurred before, I do not know if it ever will occur again; but the other must evidently be of perpetual and daily recurrence.

I have no doubt that your Lordships will feel it to be necessary to prevent, if possible, any thing of this kind from happening in future, which can only be attempted from bad principle and illegal motives, by establishing

broadly, in all cases, and in all circumstances, that there can be no legitimacy, excepting through a regular and binding marriage; that there can be no half legitimacy of the kind which is here attempted; that the children of one marriage only can be lawful children, and that there can be but one husband of one wife.

February 8. 1811.

Mr THOMSON for the Defenders.

Though it was not the object of your Lordships in appointing this hearing in presence, that the parties should enter into any discussion with regard to the facts of the case; yet I cannot believe that you can do justice between the present parties, if the case is presented to your notice so very naked and simple as my Brother on the other side of the Bar seems to wish that it should be. The Court wishes to hear an argument on a certain statement of facts, partly admitted on both hands, and partly taken for granted, in order to simplify the question of law. Without saying how far these admissions may hereafter be retracted, or how far they may be disproved, or at least not proved, it is proper that the legal argument should be introduced by some kind of statement of them.

Your Lordships have, on the one hand, an averment that a young lady, of seventeen years of age, had, in some manner not explained by my learned friends, and perhaps not even yet fully understood by them, permitted herself to be drawn into a marriage with a young gentleman who was then attending the University, of which it is almost admitted that she immediately thereafter repented.

But it is not said that the parties ever acknowledged

each other in any respect as husband and wife. It is not said that they ever afterwards had any connexion with each other of any kind. The pursuer does not even allege that they ever saw each other from the day of this unfortunate marriage. From that period, the pretended husband ceased to live in this country, or to communicate with the lady as his wife; or to do any one thing by which the fact of the marriage could be known to any human beings but themselves.

On the other side, we allege, and in so far as the contrary is not proved, the pursuer is bound to admit it in this stage of the case, that, after this pretended marriage, the lady returned into the bosom of her family, which was one of great respectability, and which it cannot be presumed would have connived at any such proceedings; and was held out by them to the world as being a young unmarried woman. She was in consequence looked upon by the public in the same point of view; and, in short, she would, from every thing that appeared, have been reckoned a good match for almost any gentleman in Scotland.

Among others who were admitted to an intimacy with her, was my client. He was courted and caressed by the family of the young lady, and he paid his addresses to her, not secretly and clandestinely, but with the full knowledge of the whole family; and, especially, the conduct of the mother and brother was such, as not only to give rise to no suspicion of any former marriage, but fully to satisfy him that he was paying his addresses to an unmarried woman, and that they were not disapproved of by her friends

In this situation, and with this encouragement, my client paid his addresses to this lady, and the intercourse between them was carried on in a great degree by means of the lady's brother himself. The marriage also was perfectly regular. It was celebrated by a clergyman of the Church

of Scotland, after due publication of banns: And the only thing which gives room for any question on this branch of the case is, that the lady was in such a situation as to money matters, that it was thought very probable that her marriage might give rise to a law-plea; and it was apprehended, that the father of my client might have objected to his son's marrying her, till such time as that matter was cleared up. They therefore had the marriage celebrated in a private manner, to prevent any interposition of this kind. But still it was made no secret of; the moment it was over it was publicly avowed; they were received back into the bosom of the lady's family, and were acknowledged by the whole of it, without the smallest reserve or displeasure, as husband and wife: And not only did a most affectionate intercourse take place between the mother and the daughter, but between the mother and her son-in-law; and even the man-of-business who has made so detestable a figure in this cause, entered into a friendly correspondence with them, and not one hint of any thing of the kind which has since been alleged, was given by any person whatever.

Soon after this, the union was terminated by the death of the lady, and very soon after that, this odious and hateful prosecution was commenced. The prosecution makes no part of the argument which your Lordships have appointed, but thus much I have thought it to be my duty to mention, with regard to the facts of the case.

I am quite willing to admit that this case is a most important one; and also, that it is one which is involved in difficulties. If it had come before your Lordships as one perfectly unheard of and untried, either in this or in any other country, there might have been room to doubt very much about the way in which it should be decided. But I am hopeful, that I shall be able to shew your Lord-

ships that it is not a new case in this country, nor in others, and that the law of England alone is against the decision to which I wish to lead your Lordships,—that it is the only country which is different from all others in the decision of such cases.

It is too much, therefore, to say on either side, that this question is one which is quite unheard of, and one which makes every lawyer startle, when it is first stated to him. That it ought not to have that effect, I hope I shall be able to satisfy your Lordships, and I also hope to shew, that it is not open to you as a new case altogether unfettered and untrammelled by any previous authority or decision.

The question here is undoubtedly one of those which fall under the general description of Consistorial, and like other consistorial questions, it ought to be determined on the principles of the Canon law,—even although that system has been described by my friend, as having the beautiful principles of equity, which it has derived from the Roman law, vitiated and obscured, by a collection of absurd canons and rescripts, extolling Church authority above the highest secular power.

I will not enter into a vindication of the Canon law in all its claims to high authority, in point of jurisdiction over the minds and consciences of men. That matter has long since sunk to rest, and it would be needless now to revive it. But I will shew your Lordships, that it is a system of law which long prevailed in this country, and which, if it was not absolutely authoritative and binding on our ancestors, was at least highly respected in all cases; and was in a particular manner followed and adopted in all matrimonial or consistorial questions;—and even yet, whatever may be its authority, I am at least entitled to consider it as one of the sources of our own law.

In considering this point, then, how far the Canon law

is now to be held as one of the great sources of the law of Scotland, it will be necessary to go back to the period preceding the Reformation.

Your Lordships know enough of the Canon law being the general law of this country in all matters matrimonial. That is matter of trite fact, which it is not necessary for me to say much upon. It is the law, even at this day, with very little qualification, in all questions as to marriage and legitimacy; and, prior to the Reformation, the Consistorial Court, the *Curia Christianitatis*, was the only court in this country which was competent to the trial of any such question at all.

When I refer your Lordships to many *direct* authorities on this point, and when I say that there are many *incidental* authorities in our law, to shew how far the Canon law is respected by us, I do not call upon you to believe that it is absolutely authoritative, to the exclusion of the common law or of acts of Parliament. That would be too much to maintain; but I wish you to attend particularly to two acts of Parliament, in which it is mentioned expressly as the common law of this country. The act 1540, c. 80. as to the punishment of false notaries, says, "That all sik persons in times cumming, be punished in "their persons and gudes with all rigour, siklike as it is "provided by the disposition of the common law, *baith* "*Canon*, Civil, and statutes of the realm." And the act 1551, cap. 22., on the same subject, bears, "That all sik "persons sall be punished in their persons and gudes with "all rigour, viz. prescription, &c. and uther pains provided "be the disposition of the commoun law, *baith Canon*, "Civil, and statutes of the realm."

The reason why those acts more particularly refer to the Canon law, I am willing to admit, is, that notaries, to whom they relate, were, in an especial manner, under

the controul of that law; but still your Lordships will perceive, that it is expressly mentioned as a branch of the common law; and, it is plain, that the question now under discussion is one of those also which fell particularly under the controul of the Consistorial Courts.

In a passage which I shall afterwards quote from Lord Stair, your Lordships will see that he did not consider the Canon law as an authority, but only as an object of reference for its assistance in cases where our own law is silent. I do not contend for it on any higher grounds; but from these acts of Parliament I am entitled to go this length.

But there is much stronger evidence than this of the adoption of the Canon law, and of the deep root which it struck into the jurisprudence of this country. I will not enter at large into the consideration of the subject, but will confine myself to one class of cases, which are more directly in point to the present,—I mean questions with regard to the legitimation of children; and your Lordships will find, that several of our own most favourite doctrines on that subject are derived from the Canon law.

The constitution of marriage by habite and repute, and by promise *cum copula subsequenti*, seem to me, in the *first* place, to have been clearly introduced into the law of this country from the Canon law. *Secondly*, I think it very clear, that those modes of constituting marriage were not so much invented and introduced into our law, for the mere purpose of constituting marriage itself,—for the sake of the parties to the marriage (whose own fault it is if they do not conform to the established rules and forms), but as modes fallen upon to establish the legitimacy of children who would not otherwise have been legitimate. And, *thirdly*, That this doctrine of the legitimation of children is derived to us from the Canon law, and that to this extent it

has become part of our law: while it was this very part of the Canon law which the barons of England chose to reject by their celebrated declaration,—*Nolumus leges Angliæ mutari.*

Looking to this as a fair account of what I conceive to have been the origin of this part of our law, I think myself entitled to conclude, that the Canon law is not to be regarded by us, even at this day, with that contempt which my learned friend has thought proper to endeavour to cast upon it. It is also quite clear, that our law, in such matters, is directly contrary to that of England, to which I will have to allude more particularly afterwards; and, in the mean time, I only mention thsoe facts, to shew the general estimation of the Canon law in all matters of this kind.

After the Reformation, it is true, there was an abrogation of all acts and laws contrary to the newly established religion*. But what sort of an abrogation was it? It did annul "all and whatsomever laws, acts and constitutions, "Canon, Civil, and Municipal, with all other constitutions "and practics penal, introduced contrair to the foresaid re- "ligion and professions of the same." But it went no farther than this, and said nothing at all about those laws, &c. not contrary to the foresaid religion. This qualified abrogation is a fact of no light consequence in itself, as indicating what respect was paid to the Canon law by our ancestors, even when dissolving their connection with the Church from whence it sprang.

The great classes of questions which were formerly the exclusive privilege of the Consistorial Courts, were not at once, upon the Reformation, brought into the hands of this or of any other civil court. One of the first acts after the Reformation, was to erect a Commissary Court in place of

* 1567, c. 31.

the old Consistorial ones. MARY's charter to the new court, then expressly erected to supply to her subjects the loss of the old one, just gives them the jurisdiction of the very same class of cases; and it is so stated in Balfour*. This new Commissary Court was set up in place of the original Consistorial one. It was desired to take charge of the same kind of cases; and can your Lordships hesitate for a moment in concluding, that it was intended to follow the same rules in deciding them as had formerly been followed? It was not desired to follow any other rule; and it appears to me that this conclusion cannot be disputed.

Lord JUSTICE-CLERK.—In proof of that, an act of Parliament was passed to make marriage as free as by the word of God†; which shews that, if it had not been for that act, the prohibitions of the Canon law would have continued to apply even after the Reformation.

Mr THOMSON.—The Court of Session also was appointed the King's Great Consistory, clearly with a view that it should decide consistorial questions according to consistorial law; because, if it had been meant that it should decide them according to its own rules in other matters, it would only have been necessary to give it the power of review, without calling it by this new name.

In this way, it is clear that the Canon law was engrafted into the common law of this country. By this alliance of the consistorial court with our courts of common law, our courts became bound to adopt the Canon law in all consistorial questions.

That this is not a mere hypothetical view of the question, I will now shew your Lordships from more direct au-

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* Practicks, p. 670. † 1567, c. 15.

thority; and though I am unwilling to detain you with many quotations on a point which is not directly before you, yet the tone which has been assumed when speaking of the Canon law by my friend on the other side of the Bar, compels me to say a few words on the subject. I do not mean to exalt the authority of the Canon law above that of all other laws. I admit that we are bound by our acts of Parliament, and by the decisions of our own courts, and even by our established customs, in a still higher manner, than by the Canon law; but from the quotations which I am about to make to your Lordships, I will shew how far our lawyers have gone in giving respect and weight to that system of law.

Craig has given us a whole chapter on the subject of the Canon law, and though, as a true Protestant, he has not been sparing in his remarks on the manner in which it was crammed down the throats of different countries in Europe, yet he has a full chapter on the weight given to it by our law; and he concludes with the following paragraph *: "Hujus sane juris pontificii magna adhuc (licet jugum pontificium excusserimus) apud nos manet auctoritas, adeo ut quoties a civili jure dissidet (ut sæpe fit, &c.) jus Canonicum præferamus, præcipue in iis quæ ad Ecclesiæ administrationem pertinent, et ubi scandalum imminet, aut (ut Canonistæ loquuntur) quoties animæ periculum versatur, nisi quæ sint sanæ religioni contraria. Itaque quoties de administranda ecclesia agitur, qui animarum curæ præficiendi sunt, qui beneficiis, quibus beneficia debentur, de advocationibus ecclesiarum, sive de jure patronatus, de testamentis, de matrimonio vel contrahendo vel dissolvendo, qui legitimi censeantur, in his jus Pontificium, mutatis sive antiquatis nonnullis, adhuc

* B. i. d. 3. sect. 24.

" sequimur. Et hæ quæstiones ad judicem ecclesiasticum, " nempe Commissarios, rejici solent, quoties occurrunt, qui, " et judices Christianitatis, tam in veteribus Anglorum legi- " bus, quam nostris vocantur."

From this passage, your Lordships see clearly, that, in all questions matrimonial, or concerning marriage and legitimation, our lawyers continued in the time of Craig to follow the rules of the Canon law. Certain parts of it, no doubt, are now altered or modified; but, on the whole, it is the law of this country in all that class of cases.

This is not the only passage in which Craig speaks in this decided manner of the authority of the canonists; and there is one passage in which he attempts to lay down a scale of the faith to be given to the different laws upon disputed points *. " Si neque ex actis Parliamentorum, " neque consuetudine judiciali, neque jure feudali, quid " sit faciendum in quavis quæstione occurrat, ad jus civile " recurrendum est. Nam jus civile, &c. Et in foro " nostro si quid arduum, si quid difficile interveniat, ex " jure civili ejus solutio petenda est: si tamen in aliqui- " bus per jus canonicum sive pontificium sit innovatum, (et " sunt qui ea omnia collegerunt in quibus jus canonicum a " civili dissentit,) in eis jus pontificium a nostris præfertur, " præcipue ubi ecclesiæ administratio, vel scandalum (ut " canonistæ loquuntur), ubi animæ periculum versatur."

Without attempting to claim any higher station for the authority of Craig than that which, I apprehend, it already holds in your Lordships' opinion, we have here strong evidence as to what the opinion of Scottish lawyers was upon this point, in the beginning of the seventeenth century; and here I might end this branch of my subject; but I am tempted, by the tone assumed by Mr Jeffrey, to detain

* B. i. d. 8. sect. 17.

your Lordships a little longer, till I lay before you the opinions of Stair and Mackenzie on the same point.

It is true, that, in concurrence with Craig, those authors have not been sparing in their reprobation of some things relating to the Canon law,—I mean that usurped authority which the clergy in former times endeavoured to establish over many matters in which they should properly have had no concern. But, with all this, they are not disposed to exclude the Canon law from a very great degree of influence, respect and authority.

Stair* says, "And so deep hath this Canon law been "rooted, that, even where the Pope's authority is rejected, "yet consideration must be had to these laws, not only as "those by which church benefices have been erected and "ordered, but as likewise containing many equitable and "profitable laws, which, because of their weighty matter, "and their being once received, may more fitly be re-"tained than rejected." This carries the authority of the canonists nearly as high, perhaps, as is necessary for my purpose; and though the learned author appears almost to fume with a degree of indignation, which may appear ludicrous to us at present, yet even he was obliged to make the admission which I have now read to your Lordships.

He has another passage, which it is but fair to read, though it is not so favourable to my present view as the one which I have just now read†. "And though it may "appear from some narratives of our statutes, that the Par-"liament doth own the Civil and Canon laws to be our law, "as in the revocation of King James IV. (1493, c. 51), "where it is said, since it is permitted by the constitution of "laws canon and civil, that minors may revoke," &c.—"yet "that amounts to no more, than that those laws are an exam-

* B. i. tit. 1. sect. 14.

† B. i. tit. 1. sect. 16.

" ple, after the similitude whereof the Parliament proceed-
" ed. And though, in cases of falsehood, the punishment
" be assumed, as in the Civil and Canon law, which will
" make that a part of our law, yet it will not infer, that,
" even in so far it was our law before, much less in whole.
" And there is reason for the abrogation of the Canon law
" at the establishing of the Protestant religion; because, in
" the Popish church, it was held as an authoritative law: but
" since, it is only esteemed a law as to those cases that were
" upon by it when it was in vigour; and in the rest, only
" as our customs assume some particulars thereof, accord-
" ing to the weight of the matter. But for the full evi-
" dence of the contrary, there is an express and special sta-
" tute, declaring this kingdom subject only to the King's
" laws, and to no other Sovereign's law, (1425, c. 48, 1503,
" c. 79.")

This passage exhibits a remarkable feature in Lord Stair, among many others in his writings, shewing, that he was on all occasions inclined to shake himself free of the weight of authority,—a principle which he carried rather farther than will now be admitted to be right. Such as it is, I make a present of it to my friends, because I presume they will consider it to be of some value to them. It shews, certainly, that the opinion of Lord Stair, is a very qualified one; but qualified as it is, I am contented to take it as a valuable authority in my favour. It sets aside the Canon law as an authority paramount to the statutes and laws of the country itself, but it holds it out as a valuable authority on which to proceed in all matters of doubt. Taking it in this point of view, I conceive Stair's authority would have been a good one for me, even if I had had no other authority whatever for saying, that the Canon law ever was used in this country in any shape.

I will now only read a few lines from Mackenzie. He,

as was naturally to have been expected, is not just so ferocious on matters of religion as Lord Stair; and while he disclaims the Canon law as being of any binding authority in this country, yet he admits its respectability in all matters of example*. He says, "The Popes of Rome, in "imitation of the Civil law, made a body of law of their "own, which, because it was compiled by churchmen, was "called the Canon Law; and though it has here no positive authority, as being compiled by private persons at "the desire of the Popes, especially since the Reformation, yet our ecclesiastic rights were settled thereby before the Reformation: and, because many things in that "law were founded upon material justice, and exactly calculated for all churchmen, therefore, that law is yet much "respected among us, especially in what relates to conscience and ecclesiastic rights."

Having, I am afraid, said rather too much upon this introductory point, I will content myself with drawing from it this general inference, That, whereas the Canon law was every thing in this country, with the exception of the superior authority of Parliamentary enactments, and that it became the root of many of our best and wisest institutions, (though, since the Reformation, it has lost much of its authority); yet, from the constitution of our consistorial courts, they are still bound to pay the greatest attention to it. To this extent I go at present, and no further; for I am only offering an answer to the observations of the pursuer, who endeavoured to make out, that countries in which the reformed religion has been received, ought to reject it altogether.

Looking to the particular question which your Lordships have here to decide, it is not only a consistorial question,—

* B. i. tit. 1.

that is obvious;—but it is one of those consistorial questions originating in the Canon law, and it has actually been adopted from thence into the law of Scotland.

The origin of this law is not traced to an earlier period than the rescript of Pope Innocent III, which I am now to read to your Lordships. Before I read it, however, I cannot help alluding to the terms in which this rescript was mentioned by the counsel for the pursuer. The Court was told, in the most authoritative manner, that it ought not to pay the least regard to it; because, forsooth, it was not the judgment of a court of law, deciding upon legal principles; but the *ipse dixit* of an arbitrary and infallible Pope, who was no lawyer, and who decided the question by his own mere will.

Though it would be very impertinent in me to enter into a general history of the Popes, yet I cannot help alluding to the particular character of Innocent III., the Pope who pronounced the rescript in question. He was the most eminent person of his time, and is an object of very particular notice in all the histories of that age; and I will take the liberty of reading an account of him from the writings of an author, who was by no means a very partial friend of Popes in general, and, therefore, is the more deserving of notice from your Lordships, when he does speak of any of them in favourable terms. I allude to Giannone, in his History of Naples.

Lord JUSTICE-CLERK.—That book contains the best account of the feudal system which is to be met with any where.

Mr THOMSON.—He does not overlook the character or merits of Pope Innocent III. In mentioning his elevation to the Papal chair, he says*, "Ma ecco, che dopo questi av-"venamenti Papa Celestino, che sette anni avea governata la

* Lib. xiv. cap. 1.

" Chièsa, si morì in Roma l'ottavo giorno de gennajo dell'
" anno 1198, ed in suo luogo fu eletto Giovanni Lotario
" Cardinal di S. Sergio, e Bacco di nobilissima stirpe, gio-
" vane di non più che trenta anni, ma di grande avvedi-
" mento, ed il maggior letterato, e guireconsulto di que'
" tempi, che Innocenzio III. nomossi." And, in another place, he describes him more particularly, in these words * :
" Pontèfice a cui molto deve la Chièsa Romana, perchè
" colla sua accortezza, e molto piu per la sua dottrina, la
" ridusse nel più alto, e sublime stato, e chea avea saputo
" soggettarsi quasi tutti gli stati, e principi d'Europa, i
" quali da lui come oraculo dipendivano. E cotanto era
" la riverenza del suo nome, che ridusse Alfonso R. d'Ara-
" gona a rendergli tributario il suo regno, e di farsi uom
" ligio della Chiesa Romana, e volle da lui essere in Roma
" incoronato, il che a sua imitazione fecere anche altri Prin-
" cipi. Egli come dottissimo in giurisprudenza chiamò in
" Roma i maggiori personaggi a compromettere a lui le lor
" differenze, ed a contentarsi, che dal suo giudicio fossero
" terminate: quindi le più gravi, e rinomate controversie
" di Stati, e di Prelature in Roma si riportavano. Quindi
" abbiamo tante sue epistole *Decretali*, delle quali sin da
" questi tempi ne fu fatta *raccolta*, e data a leggere a' studenti
" in Bologna; onde potè da poi Gregorio IX. fondare piu
" stabilmente la monarchia Romana. Fu studiosissimo delle
" leggi Romane, e particolarmente delle Pandette; e fu
" perciò riputato uno de' più grandi giureconsulti di questi
" tempi, che fiorivano in molte città di Italia, e particolar-
" mente in Bologna, resa sopra tutte le altre illustre per la
" famosa accademia di leggi, e piu per *Ugolino* ed *Azone*,
" che an questi tempi vi fiorivani."

Your Lordships here see, that this Pope was not the ignorant, the arbitrary, or the capricious person, that he

* Lib. xv. cap. 4.

was called yesterday. And it is this person, whose rescript, sanctioned as it has been, by the laws of all Christendom, excepting the law of England, I am now to read to the Court. It is to be found in the Decretals of Pope Gregory the Ninth, B. iv. t. 17., which treats of *Qui Filii sunt legitimi*, § 14. of that title. And, by the way, I would observe, that this title of the Canon law may be quoted in this Court, not only as giving rise to the question which I am now arguing, but as the foundation of all the law of our courts, as to the constitution of marriage by promise and copula, and by habite and repute. It is in these terms:—"Ex tenore literarum vestrarum nobis innotuit, quod cum G. viduam hæreditatem quondam R. "mariti sui sibi et pupillo filio suo restitui postularet, pars "adversa petitionem ejus excluderet, pro eo quod R. ma"ritum ipsius viduæ de adulterio genitum asserebat: pro"ponens quod dicti R. pater vivente uxore legitima, quan"dam aliam Maritiam nomine superduxit, ex qua præfa"tum R. maritum ipsius viduæ generavit. E contra vero "pars viduæ respondebat, quod cum Maritia præfata nes"ciens quod dicti R. pater aliam haberet uxorem cum eo "in facie ecclesiæ contraxisset, ejus filius, quem suscepit ab "eo, legitimus debebat haberi, cum non debeant illegitimi "reputari, qui de adultera conscientia non nascuntur. "Cumque super hoc diutius fuisset in vestra præsentia li"tigatum, et nonnullorum prudentum sententia, quorum "concilium requisistis, in hoc invicem discordaret, se dux"istis Ap. consulendam. Nos igitur intelligentes quod "pater prædicti R. matrem ipsius in faciem ecclesiæ, igna"ram quod ipse aliam sibi matrimonialiter copulasset, "duxerit in uxorem; et dum ipsa conjux ipsius legitima "putaretur, dictum R. suscepit ex eadem; in favorem pro"lis potius declinamus, memoratum R. legitimum repu"tantes."

Your Lordships will remark the manner in which this rescript is expressed.

"From the tenor of your letters, it has been made known to us, that G. demanded, that the vacant inheritance of the deceased R., her husband, should be restored to herself and her pupil son. The other party would have excluded this petition, on the ground, that R., the husband of the said widow, had been born of an adulterous connection; in so far as the father of the said R. had, during the life of his lawful wife, taken another wife, of whom the foresaid R., the husband of the said widow, was born. It was replied, on the part of the widow, that, as the second wife had married the father of the said R., *in facie ecclesiæ*, in ignorance that he had another wife, the child which she bore to him ought to be legitimate; because no children ought to be looked on as unlawful, who are not born of conscious adultery." The Pope observes, That this had been long litigated, and that there had been great differences about it, in the opinions of learned men; and proceeds: "Intelligentes quod pater prædicti R. matrem ipsius in "facie ecclesiæ, ignaram quod ipse aliam sibi matrimonia-"liter copulasset, duxerit in uxorem, et dum ipsa conjux "ipsius legitima putaretur, dictum R. suscepit ex eadem, "in favorem prolis potius declinamus, memoratum R. le-"gitimum reputantes."

There is a complete analogy between the two cases, with this difference in my favour, that there the *status* of a living man was not in question, as it is in the present case.

Your Lordships are told, in the narrative of this case, that it had been the subject of a long litigation, and the occasion of great difference of opinion. You are not told that all the lawyers were against the legitimacy of the child: you are expressly told, that there had been great difference of opinion; and looking on the case as in some degree a new

one then, though even of this we are not clearly informed, there is no wonder that there had been such a difference of opinion. And here your Lordships see, that, on consideration of the law, and not on matter of caprice or arbitrary power, this most learned and dignified lawyer gives his opinion in the matter, in words most modest, no doubt, but just on that account entitled to the more weight, in favour of the legitimacy of children in such situations.

Such were the rescript and the opinion of Innocent III. and I need not tell your Lordships, for the fact is admitted on the other side of the Bar, that that decision has not been considered as bad law by the Canonists; on the contrary, it was expressly received as a general rule of the Canon law, and was published as such, by its insertion among the Decretals of Gregory IX.

Many of the commentators have written at large upon the Canon law; and it cannot be disputed, that that decision has been admitted as a good one, by every author on the Canon or the Civil law, and has been called a sound and legal determination.

I could occupy hours with quotations from various authors on this subject, but I will only give one of them, which I have selected from the rest, merely because your Lordships will not suspect him of any improper preference of the Canon law over the Civil. I mean Cujacius, in his Solennes Recitationes, on the 2d, 3d and 4th books of the Decretals, who says a great deal on the title, *Qui Filii sunt legitimi*, in which the rescript of Pope Innocent III. is inserted. If it was not from a dread of fatiguing your Lordships, I could read many passages from this book, of cases, where there was found to be full ground for annulling marriages, and yet the nullification of the marriage was held not to be enough to take away the legitimacy of the children. The passage more immediately relating

to the rescript of Innocent III., and to the present case, is in these words*: "Mater quæ gerebat tutelam filii impuberis "a possessore invito petiit hæreditatem, quæ ab avo ad pa- "trem ejus, maritum suum pervenerat, et a patre ad fi- "lium successionis jure. Excipit possessor, patrem pu- "pilli sui non fuisse legitimum hæredem avi patris sui, eo "quod ex adulterio avus eum succepisset, puta ex alia mu- "liere cum ea contractis nuptiis viva priore uxore, et pa- "lam in conspectu ecclesiæ. Recte decernit Pontifex, ig- "norantiam mulieris pupillum excusare, ignorantiam se- "cundæ uxoris, ut in cap. 2., & c. 10. s. c. ult. § pen. de "Cland. Despons. et ideo pupillum esse legitimum."

Cujacius, in this place, gives no extensive commentary on this particular text, because, in a previous passage, he had given a long commentary on a similar or analogous case; but it was the positive opinion of that lawyer that the rescript was a good one.

It is not disputed, even on the other side of the Bar, that *bona fides* serves to legitimate the children in cases of incest, and incapacity by being within the forbidden degrees. They endeavour to rear up a distinction between marriages which are null, and marriages which are only voidable; but they admit that *bona fides* will legitimate the children of prohibited marriages. I could read many passages to your Lordships, as to the cases of such *bona fides* in these two classes of marriages; but all this is admitted by the other party, and I have a great deal yet to say upon other parts of the case. The doctrine which I am now maintaining is incorporated into the law of every Christian country in Europe, with the exception, perhaps, of that of England, and even of that I am by no means satisfied.

I shall proceed now to consider how far the argument of the pursuers is well founded, that this principle has not

* B. IV. t. 17. cap. penult.

been admitted into the law of Scotland. And I think the authority of our writers, and the opinions which they held upon this subject, warrant me in asserting that the doctrine which I now contend for, has struck its roots very deep into the law of Scotland. That such was the fact, I hope to be able to satisfy your Lordships by a reference to every authority in our law, compiled since the Reformation. As to any writers previous to that time, you will not be surprised that I cannot say much, when you consider that so many of our writings were destroyed or lost at that time.

Balfour was contemporary with the Reformation; but his collection was made at an early period of his life, before those questions came much into dispute, and your Lordships will not be surprised that he does not say much about it.

But the Regiam Majestatem is a very excellent authority upon this point; and, though it is now admitted not to be so old as the reign of David the First, it is at least prior to the middle of the 15th century. In B. ii. cap. 16. § 73. and 74. are these words:—"Si in vita alicujus viri uxor "sua fuerit ab eo separata ob aliquam sui criminis turpitu- "dinem, nullam vocem clamandi dotem habere poterit. "Idem dico, si fuerit ab eo separata, propter parentelam. "*Et tamen liberi ejus possunt esse hæredes, et de jure "regni patri succedent jure hæreditario.*" This, to be sure, is not the case of an impediment arising from a pre-contract; but it is a case of an impediment, equally strong, of a party that cannot marry at all on account of consanguinity; that is, of an incestuous connexion.

As to the passage in the Regiam, it is a little extraordinary, that it is not to be found in all the manuscripts; and I shall therefore read a passage to shew the opinion of one learned lawyer with regard to it, and as to the general effect of the *bona fides*,—I mean Skene's note on what I have

just read. He says, " Hunc locum restitui, veterum codi-
" cum fidem, et jus Canonicum sequutus. Parentelam
" autem intelligo vel consanguinitatem vel affinitatem,
" propter quas infra certos gradus de jure pontificio dis-
" solvitur matrimonium, nisi Papæ dispensatio intervenerit.
" Mulier itaque propter parentelam a viro separata, nullam
" dotem petere poterit; tamen liberi ex eo matrimonio
" procreati, etiam ante sententiam dissoluti matrimonii, legi-
" timi sunt, et jus successionis obtinent; quia eorum
" causa est favorabilis. Ideoque cum de eorum conditione
" agitur, tempus non solum contracti matrimonii, sed etiam
" conceptionis inspicitur. Etenim liberi legitimantur, per
" nuptias contractas, videlicet bannis solenniter inde editis,
" impedimento nullo comperto, et altero conjugum bonam
" fidem habente, tempore matrimonii inter eos contracti."

This is the doctrine laid down by Skene, who could not have been ignorant of the decretals, but must have had them in his eye at the very time when he wrote this passage; and he says, that if all the conditions have been complied with that the law requires, it ought to be a good marriage, to the effect of legitimating the children, even if the marriage itself should turn out to be null and void.

Your Lordships will now turn to the writings of a lawyer nearly contemporary with Skene; I mean Sir Thomas Craig. You have heard many remarks which I must say were rather cavilling, from the pursuer, as to this writer. I know well, that Craig has laid down many things which cannot be admitted as law in this country. Many parts of his feudal doctrine may be called in question, as being more of a foreign than a Scotch complexion; but by far the greatest part of his book is most unexceptionable; and I am entitled to hold, that, with whatever foreign matter he has in some places blended it, he has at least given us all that was in his time law in Scotland. But our law was not then ripe,

by any means, and he was sometimes obliged to go to foreign laws to fill up the system in those parts in which it was deficient.

On this particular subject, I am presently to shew your Lordships, that Craig lays down, not the particular doctrines of the Canon law, but what he knew, and all the authorities of his time knew, to be actually part of the law of Scotland, in the matter of bastardy and legitimation. Among a great deal of matter relating to this subject, he says *, "Sed advertendum est, totam hanc quæstionem hodie ex jure pontificio pendere, cum sit quæstio quæ prorie ad conscientiam pertineat. Ex quo jure, multi etiam in matrimonio nati non sunt legitimi; multi, nondum solemnizato matrimonio, legitimi.

"18. Ut id planius fiat, sciendum matrimonium aliquando de jure, aliquando de facto contrahi. Prius vocatur justum matrimonium et legitimum, i. e., cui neque lex neque jus obstat, quo minus copulare contrahentes possunt. Quod autem matrimonium dicitur de facto contrahi, illud est quod habet impedimentum a jure vel a lege, quo minus illud a principio consistere possit, veluti si alteruter antea conjugatus fuerit, nam stante priore matrimonio, et vivo conjuge, neque vir neque uxor contrahere novum matrimonium potest; dissolvendaque est semper illa conjunctio, cum vir vivente prima conjuge, alterius conjugis vir esse non possit, nec uxor alterius mariti uxor, vivente primo marito," &c. And, after mentioning the prohibited degrees, and marriages dissolved for adultery, he says: "Sed ubi ab initio matrimonium non stabat, nec stare poterat, propter impedimenta quæ proposui; aut ea impedimenta nota erant utrique parti aut alterutri: si utrique, filii sunt illegitimi; quod si alteri tantum, alterius bona fides, licet non sufficiat ad confir-

* Book ii. Dieg. 18. sect. 17.

" mandum et stabiliendum matrimonium, sufficit tamen ad " legitimationem prolis: nam jura pontificia favent magis " legitimationi liberorum ex hoc matrimonio, quam ipsis " conjugibus, adeo ut multa habeantur in jure pontificio " quæ matrimonium dirimant, non tamen ut liberi sint il- " legitimi faciant. Quid si, constante adhuc tali matrimo- " nio, quod de facto celebratum est, notitia impedimenti " ad utrumque conjugem pervenerit, statim se a mutua co- " habitatione separare debent; et, si qui postea inter eos " producantur liberi, illegitimi sive bastardi nascuntur, " manentibus in suo legitimorum statu eis qui ante noti- " tiam concepti sunt." And, in section 19. he goes still farther:—" Sed si unus tantum conjugum sciverat, alter " non, alterius bona fides ad legitimationem sufficit. Si de " impedimento judicium sit susceptum, lisque contestata, " nondum mala fides utriusque inducitur; cum constante " matrimonio, et non per sententiam dissoluto, neuter con- " jugum debitum conjugale alteri denegare debeat: sed per " solam dissolutionis sententiam, mala utriusque fides ar- " guitur: ita tamen ut filii ante sententiam concepti aut " suscepti legitimi nascantur, non post."

According to this, it is not till sentence of dissolution actually takes place, that the legitimacy of the children is at all affected; and it is only that of the children afterwards born which is so.

In the same and subsequent sections, Craig continues this discussion; and the Civil law is repeatedly referred to, not with the view of adopting it, but with the view of shewing that it was not the law of this country. But there is no such caution given with regard to the Canon law; and he ends the whole with the passage commented on by Mr Jeffrey:—" Hæc sunt quæ de bastardis tam jure Civili quam " Canonico quo hodie utimur præscribuntur." Whence it is quite clear that the *quo hodie utimur* was meant to be applied solely to the rules taken from the Canon law, thus

clearly receiving the one and rejecting the other, not merely from his own private opinion, but as acknowledging the opinion of lawyers, and recommending his distinction to the adoption of the courts of this country.

Before quitting this matter, I shall only add, with regard to the criticism of the pursuers, by which they endeavoured to shew, that Craig only spoke of a limited or half legitimation, that if they will shew me any part of his writings, upon which such a meaning can be put, I shall be very much obliged to them, for I have been unable to discover it. But if the doctrine of Craig be a bad one in itself, it cannot possibly be mended by any such limitation.

And now your Lordships will attend to the opinion of Lord Stair. I am ready to admit that he did not know of any recent case upon the subject; and that, in the very scanty practicks from which he formed his wonderful system, which is founded altogether on a few reported cases of this Court, chiefly in his own time and that of Durie, he has not discovered any thing in favour of the opinion of Craig. But that does not affect the question. Mr JEFFREY maintained, that Stair begins by telling us what was the law of this country with regard to bastardy, and that then, by way of amusing or instructing his readers, he went into the discussion of foreign matters quite distinct from the law of this country; and that he has combined, with his own disquisition upon the law of bastardy, a set of limitations and qualifications about something else, not at all in point to the question before the Court. This is so very wild an idea, that, with all the extreme ingenuity of my friend on the other side, I cannot believe it made any great impression upon your Lordships.

The opinion of Stair is thus expressed*: Those are bastards "whose parents were married and in capable degrees,

* B. iii. t. 3. sect. 42.

" yet the marriage was inconsistent, because of some impe-
" diment, as if either party was married before, and the
" other spouse in life, whether that were solemnly or pri-
" vately, by promise of marriage and copulation following;
" in which last case, if the impediment be secret, and not
" known to both parties, Craig observeth as his own opinion,
" and the opinion of the Canonists, that the said impedi-
" ment, though it be sufficient to annul the marriage, yet
" not to take away the legitimation of the children pro-
" created during the *bona fides* of any of the parties before
" knowledge of that impediment."

Here, undoubtedly, the authority which Stair states, as the only one which he chose to take in support of his own opinion, is that of Craig. But Craig's opinion was not as to abstract or general law, but as to the law of this country. And as such, and as an author whom Stair quotes on all occasions, even when he differs from him, and says so, he is here quoted without any hint whatever that he entertains doubts of the soundness of his opinion. It was not the custom of Stair so to bewilder his readers: whenever he differs in opinion from any person whom he refers to, he tells us that he does so. I am therefore entitled to believe, that he held the opinion of Craig as a sound one upon this point, and that, in referring to it, he meant to describe it as the law of Scotland.

Such is the view which I flatter myself your Lordships will take of this part of my case; and, therefore, without wasting time in a more full refutation of this part of my friend's argument, I cannot help flattering myself that a serious perusal of this passage of Lord Stair will satisfy you, that he was recognising this as a qualification of the general doctrine which he had been laying down on the subject of bastardy.

On this subject your Lordships have also the opinions of

Lord Bankton and Mr Erskine in favour of my argument. Lord Bankton says *, "By the Canon law, the *bona fides* "of either party was sufficient to support the marriage in "favour of the children, so that such as were procreated "before the marriage was declared void, were esteemed "lawful; And, by the law of England, if a man marry his "sister, they are husband and wife till divorce, and the "children lawful; and if the husband die before divorce, "the wife is entitled to a dower.

"The Canon law is very much regarded with us in matters "of marriage; and, therefore, it may be justly thought that "the *bona fides* of either of the parties will be sufficient for "legitimacy of the children. Such *bona fides* will be the "more easily presumed, if the marriage was publicly so-"lemnized, than when it was clandestine. The learned "Craig is of this opinion, and that *mala fides* cannot be "induced, but by sentence of the proper court annulling "the marriage; and as this is likewise the opinion of other "feudists, it is highly probable the same rule will be fol-"lowed with us. As to the wife, in such case, if she was "holden and reputed lawful, and the marriage not chal-"lenged in the husband's life, she is, by express statute, "entitled to a terce, and will bruik it, till it is found, by a "sentence of the proper court, that she was not a lawful wife. "It may be thought, from the latter part of this statute, "that the widow loses her terce after sentence, finding that "she was not the deceased's lawful wife, though the mar-"riage was not challenged in his life; but I conceive that "this must be understood of the case, where there was no "actual marriage solemnized, but only cohabitation, which "might have been in the way of concubinage; for if she "was *de facto* his wife, *bona fide* married to him, and the "marriage not called in question during the husband's

* Inst. b. i. tit. 5. sect. 51.

"life, it follows, from what is above said, that she is en-
"titled to her terce, in the same manner as the children to
"their legitimacy, and to succeed to their parents and
"other relations, though there was a legal impediment,
"by consanguinity or otherwise, sufficient to have annulled
"the marriage."

It is admitted, even by the other party, that Lord Bankton, referring no doubt to the Canon law, lays it down as a doctrine, which, though he was not aware of any decision on it, yet was recommended by the authority both of lawyers and of the laws of every other country; and *he*, at least, had no doubt as to what would have been the decision of the Court of Session, if the question had occurred in his time. Bankton, when he wrote that work, was aware of the case of Campbell of Carrick, in which this very point came under the discussion of the Court, though it was not necessary to decide it directly. Of that case he could not have been ignorant; and he held, that if the question had gone on to trial, it would have been held to be part of the law of this country, that the *bona fides* of one of the parties was sufficient for the legitimation of the children.

Mr Erskine's work contains a passage very nearly of the same nature as the one from Bankton, in which it is laid down as part of our law, and held out as having been derived from the Canon law, and from the opinions of Craig, Stair, and Bankton. His words are *, "As all marriages reproba-
"ted by law, whether on account of bigamy or propinquity
"of blood, are utterly null, the issue of them must be ille-
"gitimate, in the same manner as if they had been born out
"of wedlock; but if either of the parties were, at the time
"of the marriage, ignorant of the near relation they stood
"in to one another, or of the prior marriage, the *bona fides*
"of that party, though it could not make the marriage law-

* B. i. tit. 6. sect. 51.

" ful, had, by the Canon law, the effect of legitimating the " issue, provided the marriage, labouring under the nul- " lity, had been solemnised in the face of the Church. " Craig is of opinion, that such of the children as are pro- " created after both parties have come to the knowledge of " the fact which made the marriage unlawful, are to be " reputed bastards; but that the ignorance of any one of " them ought to support the legitimacy of the children be- " gotten prior to the decree by which it is declared void; " because, till then, none of the spouses ought to decline " the conjugal duties."

But though, perhaps, there has been no decided case, and though the opinions of lawyers cannot be quoted to your Lordships as authorities, any more than the opinions of minorities, of which the counsel for the pursuer spoke yesterday, yet they are well worthy of consideration, as giving the opinion of the country, or of the Bar for the time, in any case like this, where we are treating of the history of any branch of the law. At a former period of this question, therefore, I took some pains to look into the papers in the case of Campbell *v.* Cochrane. Your Lordships know, that the case there was, that a marriage took place between Campbell of Carrick and Jean Campbell, some time after, another marriage with Magdalen Cochrane, which had been kept secret for many years;—at least no claim had been made by her upon Carrick during twenty years that he lived with his second wife; and he was allowed to live with her during all that time unmolested by, and even in the sight of Magdalen Cochrane, who called herself the first wife. After his death the question came on as to the rights of the two persons claiming the character of his widows. And the point of law really at issue was, Whether the *bona fides* and ignorance of the second wife, sanctioned by the long silence and complete *mala*

fides of the first, was not sufficient to found a plea of personal objection, by which the first wife could be excluded, even from proving that she had ever been married to him? That was the question directly at issue in that case; but in arguing that point, a great deal of discussion was thrown in as to the effect of the *bona fides* (even supposing the first marriage to have been made out) of the second marriage, both on the wife's claims as widow, and on the children's right to legitimacy. I shall read only one passage on this point, which I have copied from one of the original pleadings for the defender.

"Supposing the pursuer to have been married to the "Captain, as she asserted, it would by no means follow "that she was entitled to all the rights and privileges "competent to, and provided by law, in favours of a law-"ful wife or widow; for, since she had concurred with the "Captain in a most notorious cheat, which must have "been the case, upon her supposition; and since that cheat "had been carried on during the Captain's life, the defen-"der Mrs Jean Campbell, who had performed her part "of the matrimonial contract, must be entitled to demand "performance of what the law gives a wife out of the hus-"band's effects; and that the pursuer must be removed "*personali objectione* from competing with her."

From what I have already read, your Lordships will have observed, that that case was different in many respects from the present; because there, there was *mala fides* on the part of one of the parties to the action. I quote this only to illustrate the next part of the argument, which goes to shew, that, in the opinion of the lawyer who argued that case, an incestuous marriage was weaker, in point of effect, than a second one, contracted *bona fide* during the subsistence of a first; and it will be observed, that, in arguing his case, he considers the privilege of the daughter of the second marriage

to be quite unquestionable, for he proceeds: "And to il-
"lustrate this defence, it was no new thing in the law for
"a marriage to be unlawful; and yet the wife and child-
"ren to be entitled to all the privileges consequent upon
"a lawful marriage. Where marriage was found null, as
"being within the prohibited degrees, the fact being un-
"known to the parties, or to either of the parties, the
"*bona fides* had the effect to make the children be consi-
"dered as legitimate, so as to be entitled to succeed to their
"father's estate; Reg. Maj. lib. ii. cap. 16. sect. 74.; Craig,
"lib. ii. Dieg. 18. sect. 18. If the children in such a
"case be legitimated, surely the present case was equally
"strong, if not stronger, in favours of Miss Campbell the
"only child of the marriage; that the mother's *bona fides*
"must infallibly have given her all the privileges of a
"lawful child. Had her father preserved his estate, she
"must have succeeded to him; and she must have been
"capable of every succession which could befal the lawful
"daughter of Campbell of Carrick: And if these were un-
"questionably the privileges of the daughter, how could
"any one hesistate for a moment about the privilege of
"the mother? How could even the pursuer doubt, but that
"the mother's *bona fides* must have entitled her to all the
"privileges of a lawful wife, as well as it entitled the
"daughter to all the privileges of a lawful daughter?"

This, however, was not the point properly at issue in that case, but whether the first wife was to be let into a proof of her alleged marriage; a point of great consequence no doubt, but one which rendered a direct judgment on the present subject unnecessary; but they founded upon the doctrine which I am now maintaining in the course of their argument as a matter totally unquestionable.

This certainly, however, was nothing else than the opinion of the lawyer who wrote the paper from whence I have

taken it: But your Lordships have also what is called by my friends the *obiter dictum* of a minority of the Court, which it was alleged, they were in some unaccountable manner obliged to throw in,—as a sort of *ruse de guerre*,—or something to save themselves in their retreat from a decision, in which their opinion was overruled. But from the way in which this alleged *obiter dictum* is mentioned in the report, your Lordships will see that this idea is altogether unfounded; that the Judges of that day unanimously entertained the opinion, that the child of the second marriage was legitimate; for it is quite clear that EVEN the minority held it; and from the whole nature of the report much more must the majority have done so.

After recording the arguments, in the course of which he gives a great deal of what is contained in the papers, the reporter proceeds:

" Such of the Lords as were for the interlocutor (which " had allowed a proof of the first marriage), declared, that, " whatever was the issue of this question, the daughter " would be legitimate, from the mother's *bona fides;* and " they inclined to think Magdalen Cochrane's conduct " would be a sufficient ground for Jean Campbell's being " preferred to the emoluments due to a widow, but that " she could not thereupon be precluded from proving she " had really been his wife. The Lords remitted with an " instruction not to allow a proof."

To my understanding, it is clear to demonstration, that those Judges who went the length of pronouncing that decision, must have gone the length of the minority also, which was a step much less difficult, and much less delicate, than the one which they decided. Your Lordships cannot have a doubt upon the subject. It clearly was the opinion of the whole Court. And it was entertained, not on a matter merely thrown out at random at the bar; but on one

which had been deliberately argued by the parties. There is no doubt at all, that, according to the opinion of the Judges who sat in this Court in the year 1747, a party in the situation of my client must have been successful.

Lord MEADOWBANK, was not the decision in that case altered in the House of Lords?

Mr THOMSON.—Yes, but it was altered of consent of the parties; for it would appear that the first wife, Mrs Cochrane, failed altogether in bringing proof of her averments. The fact as to the appeal was, that the case having returned to the Commissaries, an interlocutor, in terms of the above-mentioned instruction, was pronounced: And, by a subsequent interlocutor, they "found the "facts, circumstances, and qualifications, as proved by "the writings and documents produced for, and the de-"positions of the witnesses led in behalf of, the said "Mrs Jean Campbell, relevant to infer marriage and legi-"timation; and found, that the deceased Captain John "Campbell of Carrick, and the said Mrs Jean Campbell, "were husband and wife: and, therefore, found and de-"clared in behalf of the said Mrs Jean and Miss Jean "Campbell, conform to the conclusions of the libel; and "found, that the said Magdalen Cochrane was barred, *per-*"*sonali exceptione*, from being admitted to prove that she "was married to the said Captain Campbell before his mar-"riage with the said Mrs Jean Campbell; and, therefore, "dismissed the process of declarator at her instance, and "absolved the said Mrs Jean Campbell *simpliciter* there-"from, and decerned accordingly."

This, and the preceding interlocutors, were afterwards appealed from by Magdalen Cochrane, on the ground that she ought not to have been precluded from bringing forward the evidence of her alleged marriage. By this

time, the facts of the case had come out so strongly in favour of Mrs Campbell, that it was not deemed of any importance to rest on the preliminary objection to the counter-claim of Magdalen Cochrane; and, accordingly, the appeal did not proceed to a hearing, but "the interlocutors complained of were, *by consent of the respondent's counsel*, "reversed, except such part thereof as remits the bill of "advocation and cause back to the said Commissaries." This important fact is expressly stated, in these words, in the case lodged for Mrs Campbell, in the appeal afterwards taken by Magdalen Cochran against the judgments of the Commissaries, and of the Court of Session, repelling her claim, and sustaining the validity of Mrs Campbell's marriage. In these circumstances, the original judgment of this Court, on the plea of personal exception, stands entire, and may now be founded on as a precedent, entitled to the serious consideration of your Lordships. The circumstances of acknowledgment and homologation, as well as of a fraudful concealment, if there were any thing to have been concealed, are, in the present case, as strong as in the case that has been quoted. In giving effect to the personal exception in the above case, the Court had to set aside, not merely the claim of a third party to a contingent pecuniary interest, but of one of the parties to an alleged marriage, whose character and *status* were to be materially affected by the issue. But, in the present case, it is never to be forgotten, that no question of *status*, excepting that of the defender himself, is at issue; and that, by giving effect to this preliminary plea, your Lordships will protect the acknowledged *status* of the infant defender, as a lawful child, from all question at the instance of a party who must be held to have willingly and knowingly concurred in the marriage of his parents, and in the establishment of his legitimacy as the offspring of that marriage. The case of Campbell forms a very important precedent in another

branch of the law of Scotland, which is not now before the Court. That seems to have been the fate of the case, but it is foreign to the present matter.

On all of these grounds, I hope I am warranted in concluding, that, in applying your minds to the consideration of the present question, your Lordships are not going upon new grounds; that the matter is not now open to consideration as a totally new case, but that you are aided and assisted by many authorities, and by the opinion of the whole of your Lordships' predecessors at a period not very remote; and that, by deciding the case against my clients, you would tear up by the roots some of the oldest, most important, and best established principles of the law of Scotland.

Before making any remarks as to what might be the subject of discussion, on the idea that there was no authority upon the case at all, I am now to call the attention of your Lordships to the laws of England and of France.

I am by no means surprised that the doctrine for which I contend should not have been received into the law of England (if it be the case that they do not receive it). Your Lordships know perfectly on what narrow grounds the law of England has proceeded in every case of marriage and legitimation. In the case of a system like this, are your Lordships to be told with gravity, that that system is the one which of all others you ought to regard, and imitate, and adopt, as being the work of a wise, an enlightened, and a liberal people? If any one system in the world is less entitled to regard and respect from our courts of law than all the others, it is the law of England on the subject of marriage and legitimation. It proceeds on doctrines so very different, so diametrically opposed to those of our law, that it is quite impossible to make out any analogy, or to draw any comparison between them.

But even of the import of that law, after all that I heard yesterday as to the books on the subject, and even after hearing the opinion of the great living authority that was read to your Lordships, I must confess that I entertain the strongest doubts. I cannot help thinking, that there must exist in that law something very nearly akin to the doctrine which I have been maintaining; some cases, of a nature equally striking and equally contrary to the usual modes of establishing legitimation as the present is, and which Sir Samuel Romilly and my learned brethren so much abhor.

I may state to your Lordships, in few words, some quotations which have raised these doubts in my mind. One of them is from an old collection of reports, the other is from a well known Treatise on the Law of Husband and Wife.

In Roll's Reports, where a marriage was found null on the head of consanguinity, the ignorance of the parents saved the legitimacy of the children: "Si 2 fueront **** "**** s'ils fueront ignorant del consanguinitie, l'issue serra "legitime, et pur ceule ignorans serra presumé pro legiti-"matione hæredis."

The author of the Treatise of Law and Equity *, says, "If two are divorced for consanguinity, if they were igno-"rant of the consanguinity, the issue shall be legitimate."

The pursuer pretends to despise all that I can draw from these cases, and to give me a present of them; and to say, that they were cases of a voidable marriage, which, they allege, is quite a different thing from the present case, which they say is the case of a null marriage; for they maintain, that there is a distinction between marriages which are null, and those which are only voidable.

But, at all events, it is quite plain from these authorities,

* Ed. 1728, p. 439.

that this was the law of England as to the case mentioned by them, and I really cannot see why it should not be the law of England at this day, even in such cases as I am now arguing. After those two cases, I cannot see how the present doctrine which Sir Samuel Romilly seems to think so new and unheard of, should appear to be much more monstrous than the other case of an incestuous marriage (as they must admit to be law) being sufficient to secure the legitimacy of the children; and your Lordships will find, that this very doctrine is in one shape reported as law in a case preserved by Pere Williams. That case certainly does not go the length of shewing that the present question was regularly tried and decided, as this one must be; but it says something about the equity of the law of England preventing the first wife from making good any assertion hostile to the *status* of the second after the death of the husband, which is just coming to the same conclusion by a different road *. "A woman was supposed to marry A first, "and afterwards, during his life, to marry B; and, in a "cause of jactitation of marriage in the spiritual court in "Ireland, the first marriage was affirmed; but, on an ap- "peal to the delegates in Ireland, the same was disallowed, "and the second marriage adjudged good: by the second "marriage there was issue, but none by the first.

"And now there was a petition for a commission of re- "view to reverse this last sentence of the delegates in Ire- "land."

I am not prepared exactly to explain to your Lordships all the particulars of law and form by which the delegates in Ireland rule themselves; but it is generally understood, that the law of Ireland is the same as that of England; and I have now to call your Lordships to attend to

* 2. Williams, 299.

the decision of Lord Chancellor King upon this case, when he was appealed to for a reversal of the sentence. If he had held it, like some modern lawyers, to be so monstrous as never to have been heard of or thought of before, he never would have permitted even an argument upon the subject. Now, what does he do? The report bears,

"Lord CHANCELLOR KING.—A commission of review "is not a matter of right, but purely in the discretion of "the Crown; and there being issue by the last marriage, "and none by the pretended first marriage, this commis- "sion of review tends to bastardize and render illegiti- "mate the innocent issue by the last marriage, which ought "not to be favoured, so that I am against granting this "commission, and shall advise the Crown accordingly."

I do not know what principles of law, or notions of discretion, Lord Chancellor King might permit himself to use in deciding a case like that; but I submit to your Lordships, that, at all events, it is quite impossible to say that the doctrine of my clients was reckoned so very monstrous as it is now, insomuch that we are scouted by the other side for even venturing to state the argument to your Lordships.

I do not argue this as direct authority, for Lord Chancellor King only refused to permit the case to be tried. I do not argue it farther than to throw it out to your Lordships as evidence, that, in his mind, such a plea as that which I now maintain would have been reckoned a good one; at all events, he would plainly have thought it one entitled to every favour, for he refused to permit the fact to be established, by means of which it might have been called in question.

With regard to the law of England, I feel so little inquietude, that I do not think it is necessary to make any more inquiries about it; for, in all that part of it which is

connected with the present question, it is so abhorrent from our own law, as not to furnish one distinct authority upon which your Lordships can proceed.

In the law of France, the doctrine of my client has been completely recognised, and it has been acted upon in many instances. From the writers on that law I shall quote two authorities, for the purpose of shewing their opinion upon the subject. I allude to the well known and very eminent lawyers Daguesseau and Pothier.

The case to which I shall refer from Daguesseau, was one in which an attempt was made to combine two distinct principles, legitimation by subsequent marriage, and also legitimation by *bona fides*.

Fiorella, the celebrated French Scaramouch, had married a Venetian actress, with whom he lived many years,—then tiring of her, he took another woman, with whom he lived for some years in a state of fornication. At length the first wife died, and he then married the woman who had been his mistress, or declared that he had been married before; and the question arose, whether the child of the second marriage could be held to be legitimate by the subsequent marriage; and, in the discussion of that question, it became a subject of consideration how far the *bona fides* of a second wife would serve for the legitimation of the children.

Daguesseau was the opponent of the claim, and, in maintaining that the child was not legitimable, he displayed a great deal of learning in collecting together all the authorities on the subject. He shewed with great success, the absurdity of supposing, that a marriage, begun in circumstances where the parents knew from the beginning that it was an illegal marriage, should have the effect thereafter of bestowing the *status* of legitimacy upon the children, which is quite a different case from one where there might have been a legal

marriage at the time when the connection commenced; and in contrasting the two cases, he had occasion to take notice of what is the undoubted law of France on the question now under the consideration of your Lordships, and a rule which does not appear to have been adopted in their law, merely because it was a part of the Canon law which was their *Droit Civil*, but an account of the substantial justice and equity of the rule.

He says*: "Quoique regulierement le seul mariage "legitime et veritable puisse aire naitre des enfants legi- "times et de veritables fils de famille, cependant par un "effet de la faveur des enfants, et par la consideration de "la bonne foi, il a été reçu par equité, que, s'il y avait "quelqu'empechement caché qui rendit ensuite le mariage "nul, les enfants conservassent toujours les noms et les "prerogatives d'enfants legitimes, parce qu'ils sont nés sous "le voile, sous l'ombre, sous l'apparence du marriage.

"De la cette maxime commune, que le *mariage putatif*, "pour nous servir des expressions des Canonistes, c'est-a- "dire, celui que l'un des conjoints a cru legitime, a le "meme effet pour assurer l'etat des enfants, qu'un ma- "riage veritablement legitime; maxime introduite par le "droit canonique, qui que quoique autorisée par plusieurs "textes de ce droit, fait neanmoins à peine partie de notre "droit civil: mais nous l'avons adoptée dans nos mœurs, "et vos arrets l'ont suivie."

The mere name, and character, and reputation, of marriage, is a thing so sacred, that, even when it turns out to be only apparent, it operates in favour of the children, so as to give them a fair title to legitimacy. It makes them, as it were, creditors to those who undertook to give them the *status* of legitimacy, in spite of any secret impediment

* Vol. iv, p. 274.

or fraud in one of the parties; and thus they are more what the parents intended them to be, than what they really are.

Daguesseau continues, page 279, " Le nom de ma-
" riage, nom si puissant que son ombre meme suffit pour
" purifier en faveur des enfants, le principe de leur naissance.
" L'Eglise et 'Etat tiennent compte à ceux qui contract-
" ent un mariage, de l'intention qu'ils avoient de donner des
" enfants legitimes à la republique; ils ont formé un en-
" gagement public et solemnel. Ils ont suivi l'ordre pre-
" scrit par la loi, pour laisser une posterité legitime. Un
" empechement secret, un evenement imprevu, trompe leur
" prevoyance. On ne laisse pas de recompenser en eux le
" vœu, l'apparence, le nom du mariage; et l'on regarde
" moins ce que les enfants sont, que ce que les peres avoi-
" ent voulu qu'ils fussent.

" 2. La bonne foi de ceux qui ont contracté un sembla-
" ble engagement. Il y a plusieurs cas où la bonne foi,
" jointe à un titre coloré, purge les vices de la possession.
" La difficulté a paru plus grande, lorsqu'elle n'etait que
" dans un des deux contractants: et dans ce cas quelques
" anciens glossateurs divisoient l'etat des enfants, en les
" regardant commes legitimes par rapport à l'un, illegi-
" times par rapport à l'autre. Mais il etoit absurde qu'un
" meme homme fut partim legitimus, partim illegitimus.
" L'etat est indivisible, et il paroit plus equitable de re-
" compenser le coupable avec l'innocent, que de confondre
" et à envellopper l'un et l'autre dans une meme condamna-
" tion."

There are many cases where *bona fides*, joined to a colourable title, purges away the vice of the title; that is clearly Daguesseau's opinion; and he says here, there are some persons who hold the children to be partly legitimate and partly illegitimate. But that, he says, is quite absurd;

and that it was held, by the French courts, to be much more reasonable to carry the legitimacy to the full extet, than to enter into any such distinctions. And it is not merely the *bona fides* of the party which he founds his opinion upon. It is where there is a colourable title; and as to the pretended subdivision of the *status*, he most justly reprobates it as an attempt to confound the innocent with the guilty. Daguesseau also refers, in one of these passages, to another most important consideration. The consideration to which he alludes, is the profound and deep interest the State takes in the procreation of legitimate children.

And here, my Lords, I may observe, that it is an expression of some laws, that they abhor certain things. The law of England, for instance, abhors perpetuities. But if our law has an abhorrence at any thing, it is at the state and condition of bastardy.

One view which Daguesseau had, in these opinions, was, that, when a man gets children under a belief that he is entering into a lawful marriage, the State itself becomes in some sort debtor to him that he shall have lawful children. It is a very onerous contract which a man enters into, when he *bona fide* contracts a marriage; and it is extremely hard, when he forms any such connexion, in the expectation of having lawful children, to be afterwards disappointed in such *bona fide* expectation, by an unforeseen accident. The law cannot make his marriage good, if it is a prohibited one; but, on account of the *bona fides*, it may give legitimacy to the children. This is a very strong consideration; and I am confident it must come home, not merely to the feelings of all your Lordships, but also to your understandings.

The same principles are recognised in the writings of Pothier, a lawyer, as to whom there is no differenec of opi-

nion. He has a whole title *, " Du cas auquel un mariage, " quoique nul, a des effets civils que lui donne la bonne " foi des parties qui l'ont contracté." And he lays it down in the clearest manner, that the *bona fides* of one of the parties is perfectly sufficient to support the legitimacy of the children. " Comment, direz vous, ce mariage qui est " nul, peut il donner ces droits aux enfans qui en sont nés? " car, quod nullum est nullum producit effectum. La re- " sponse est, Que si ce mariage, en tant qu'il est consideré " comme nul, ne peut pas le leur donner, la bonne foi des " parties que l'ont contracté, les leur donne, en suppleant " à cet egard au vice du mariage." And he afterwards says, " Lorsqu'il n'y a que l'une des parties qui a ignoré " de bonne foi l'empechement dirimant qui rendoit nul le " mariage qu'elle a contracté avec l'autre partie, sa bonne " foi suffit-elle pour donner à ce mariage, quoique nul, les " effets civils par rapport aux enfans qui en sont nés, et " pour leur donner les droits d'enfans legitimes, meme vis- " à-vis l'autre partie qui etoit de mauvaise foi? Le droit " canonique a décidé pour l'affirmative, et a porté jusque- " la la faveur de la bonne foi. C'est la decision du Chapi- " tre Ex tenore, 14., ext. Qui Filii sint legitimi.

" Ce Chapitre est dans l'espece d'un homme qui, du vi- " vant de sa femme, avoit espousé un autre femme, la- " quelle ignoroit qu'il fut marié. Innocent III. decide " que la bonne foi de la mere faisoit reputer legitimes les " enfans qu'elle avoit eut de ce mariage nul, meme à l'effet " de recueiller la succession de leur pere, qui avoit contracté " de mauvaise foi."

And, as an example of the principle having been completely adopted into the law of France, M. Pothier mentions the case of a woman who married a priest, in the *bona fide* belief that he was a layman, the children of which mar-

* Traité de Marriage, P. v. c. ii. art. 4.

riage were found to be lawful, to the effect of succeeding to the *mala fide* father as well as the *bona fide* mother. " La bonne foi de cette femme, et la juste ignorance en " laquelle elle a été de l'empêchement dirimant qui rendoit " nul le mariage qu'elle a contracté avec cet homme, suf- " fit pour donner aux enfans qui en sont nés, les droits " d'enfans légitimes, non-seulement vis-à-vis de leur mere, " qui étoit dans la bonne foi, mais même vis-à-vis de leur " pere, qui n'y étoit pas. C'est ce qui a été jugé par un " arrêt du 4. Février 1689, rapporté au cinquieme tome du " Journal des Audiences."

Little now remains for me to add.—All that is incumbent on me as an opening counsel in the case, is to state to your Lordships the different authorities in law, on which we maintain the legitimacy of our client, and I have purposely avoided going into expanded views. But, looking at the question generally, I cannot but conceive that its principles, even independent of authorities, are perfectly sufficient to bear it out. I do not mean to follow all the very able argument, which was stated with so much genius by my learned friend; for, as to what he argued upon the question as to the effects of *bona fides*, I really conceive that, brilliant and ingenious as he was, he totally failed in making out his case.

Your Lordships were told, with a very great shew of form and parade, that legitimation was founded on marriage; that here there was no marriage; therefore there could be no legitimacy. This conclusion is unquestionable, if the grounds on which it stands are well founded; but they proceed on so very clear a *petitio principii*, that I shall not take the trouble to examine it.

We maintain as our plea, that a completely valid and unchallengeable marriage is not necessary for the purpose of bestowing the *status* of legitimacy on the children; therefore, the dilemma of my learned friend is one which is very easily got quit of, by denying his premises.

There is one general view which I submit to your Lordships as applicable to the whole of what was said on the subject of *bona fides*. That the distinction between a real and a putative marriage, or a marriage *de facto* and marriage *de jure*, is the same as that between a null and a redeemable right, seems to be the argument of my friends; but I am inclined to throw that distinction completely aside as entirely unfounded. It takes its rise from those written forms and solemnities, in which certain particular deeds and transactions in our law must be clothed. In some cases, a party must set aside certain deeds, or observe certain forms, to get at the null right. But, in others, there is no occasion to do any thing of that kind. That is owing to the forms, and not to the substance of the law. There is no distinction between them in sound principle. There are different degrees of strength no doubt in different cases, but there is never any difference in strict legal principle. All that I heard upon this subject yesterday, appeared to me to be irrelevant and of no value. I put it aside in this way, and then what does the argument come to? They say that the first marriage was the best one. How far does that carry the Court? In a case of *fructus bona fide percepti et consumpti*, your Lordships may hold that the right is completely null; but how far do you go in such circumstances? You never order restitution of what has been consumed. In this, as in every other case of the kind, there is a clashing of rules. It is in this point of collision that the question arises, where the *bona fide* right and the true right come into contact, and the one must give way to the other. In some cases mentioned yesterday, the *bona fide* right gives way; in other cases, it is the real right which gives way to the *bona fide* one. Look at the present case. Your Lordships have some collision here, no doubt, between two alleged marriages. But you are called on to

decide, not which of the two marriages is the best one, or most entitled to favour; but what must be the consequences of these marriages, such as they are. Your Lordships may be inclined to hold that the second marriage was not a good one,—but will that get the better of all the other considerations which I have laid before you? The question, which is to get the mastery in this case, I leave to your Lordships to decide; but I do conceive that I have shewn, that, independent of all authority, the *bona fides* of the one of the parties, the respect due to even the semblance of the married state, the respect due to all the obligations consequent upon it, which, as the administrators of a liberal and enlightened system of law, your Lordships must have, will have the effect to do away the stain which they have endeavoured to cast on the birth and *status* of my client.

Lord JUSTICE-CLERK.—I want to throw out one idea for the gentlemen who are to speak next week. I do not know if there is much in it, but I wish the gentlemen of the Bar to consider it.

This hearing was ordered, no doubt, in the view of determining the effect of the *bona fides* of the husband; but I do not think either of the counsel, who have already spoken, has said enough about the *mala fides* of the wife, for as yet we must hold that she was *in mala fide*. What is the effect of that? Is there not a principle which runs through all cases of *mala fides*, and which must affect this case? Suppose she had not died when she did, and that she had been still alive, and had tired of her husband, and had told him she was done with him,—that she had been married before,—and, that she would now leave him, and carry off her estate both from him and the child; and make the child a bastard by avowing her prior marriage. Could she have maintained that plea? If she, by conceal-

ment and deceit, allured her husband into the marriage with her, could she then leave him altogether, on any pretence of this kind? I rather imagine that, on the ground of her *mala fides*, we would have prevented her from maintaining any such argument as this.

Now, what I wish to know, is, Whether, on the principles which we established in the case of Carmichael *, any one taking right through the wife, can pretend to state this, or any other plea, which we would not have permitted her herself to maintain?

12th February 1811.

Mr Thomson, for the Defender, rose again, and said, That he wished, before Mr Gillies began, to read to the Court another account of the case of Campbell of Carrick, which he had discovered that morning in Lord Elchies' manuscript Dictionary, and which he then read as follows:

"In this most extraordinary case, of the deceast Carrick's two marriages, we all agreed, that Mrs Campbell having, without challenge, lived 20 years with Carrick as man and wife, and even owned as such by Mrs Kennedy, that Mrs Campbell has all the civil rights of a lawful wife, and her children, of lawful children: Therefore we altered Arniston's interlocutor, and remitted, with an instruction to allow Mrs Kennedy no proof; *Renitentibus Arniston et President*, because Mrs Kennedy might yet be prosecuted for adultery, and might suffer in her character, which this might prevent. (But reversed in Parliament 6th February 1749, and even given up by Mr Erskine, Lady Carrick's Counsel, as un-

* 15th November 1810, Carmichael v. Carmichael.

† Elchies, voce Proof, No. 7.

" tenable, as Mr Al. Ross, her solicitor, wrote. How " different are the opinions of men in this mortal state !")

Mr GILLIES for the Pursuer.

This is a most delicate case to the law of the country; it is one of a very general nature, and it will be proper to attend to the very words of the interlocutor by which this hearing was appointed.

" The Lords having resumed consideration of the pe- " tition, with answers thereto, condescendence for the pe- " tioner, and answers,—before answer, appoint Counsel for " the parties to be heard in their own presence on the " question, Whether, supposing a prior marriage were " proved to have been entered into between the deceased " and another gentleman, the allegation of the ignorance " of the second husband of such prior marriage, at the time " when a marriage was solemnized between him and the " deceased, would be relevant to establish the legitimacy of " the defender."

This interlocutor laid before the parties and their counsel an abstract question of law, as much freed from circumstances, as completely naked, as it ever fell to the lot of any lawyer to argue in this Court. It truly results from this, that the question ought to be considered as one in which the names of the parties should not be laid before the Court, and which should not be pleaded in any other way than as a question between A and B. As such it was argued on our side of the bar. Nothing was said by Mr Jeffrey of the circumstances of the case, excepting with the view of drawing the attention of your Lordships from them, and not to them, so as to have it argued in as general a point of view as possible. The case has not been so treated on the other side of the bar. The argument of Mr Thomson was prefaced by a statement calculated to interest the minds and feelings of your Lordships relative-

ly to the ultimate effect of the judgment which you are to pronounce on the rights and situation of the parties in the case.

This was the more extraordinary on his part, considering the great advantage which he has over all his brethren of the bar in arguing such a question as this, to which he is able to bring so much learning and genius, and learning of a kind which is not much within my reach, nor perhaps within the reach of any of us but himself; for if I am not mistaken, he is the only man who professes to have made a study of the Canon law. It is rather extraordinary, considering the great advantages which he has over us, that he should have thought it right to begin his case with any such statement of the circumstances. I shall not pretend to guess at his motives for doing so. But I shall endeavour to avoid following him on that ground, further than to clear up the case; and I confess myself to be unable to follow him through all the learning which he displayed in his argument.

I shall only speak as to those facts which both parties must take for granted in this case, namely, That the deceased was married to one gentleman, and that during his life she afterwards married the present defender. These are all the facts on which the parties are yet at one; all the other matters remain (if such shall be the decision of your Lordships, as to make a proof relevant) to be the subject of after investigation.

Whether the child of the second marriage is, or is not, legitimate, is the question now before your Lordships.

It is said, that this lady never lived with, nor even ever saw, her first husband from the day of their marriage. I cannot admit this allegation. I am entitled at present to assume, that it will be completely contradicted if ever the case goes to a proof.

It is next said that she was in some measure surprised into the first marriage; and that she was hardly aware of the consequences, or of the meaning of what she was doing at the time.

I am informed, on the other hand, that all this is quite unfounded; that she was quite aware of what she was about; and she must, at least, be presumed to have been so, as she was fully eighteen years of age.

The marriage having been thus celebrated in the most regular manner by proclamation of banns, and by a licenced clergyman, she, at the distance of two years thereafter, was prevailed on to marry the defender. It is said that this was done with the consent and approbation of all the family of the lady; and that it was looked on in the same light as any other marriage between two people of equal rank and circumstances. I am very sorry that the defenders compel me to deny this statement also. The second marriage was not of the kind which it is described to have been. It was a private marriage, celebrated without the knowledge of the relations on either side; whereas, if the statements of the defenders on the other points of the case were correct, it would have been one of a totally different kind.

At the time of the marriage, she was one of three children who had been left by their father. At the date of the settlements which he executed, he had only one daughter; and he made a settlement, dividing his estate equally between her and any other children that he might afterwards have; and after that he had two sons. At the time of her marriage, I believe both of them were alive; but that is not of any consequence in this case.

Soon after her death, notice of the present action was given to her husband, by the brother who survived her. The

intimation was given by Mr Marshall. How far his conduct was correct, it is not incumbent on me to say. He is now before an infallible Judge, who will ascertain and appreciate his merits as they deserve.

Neither do I now attend your Lordships as counsel for the brother. I am not bound to justify the conduct either of the brother or of the agent. I am not to state that their example was one which any man ought to follow, under similar circumstances. Perhaps he should rather have taken one-half of the estate of his father, and left the other half to his sister's child, than have done any thing which could call her character into question in the manner that he did. But, at any rate, that character was brought into question, not by my client, but by the lady's own brother. That brother died, and it was then, and not till then, that my client, the heir-at-law of both the brother and the sister, appeared upon the field. As to the propriety of his doing so, there can be but one opinion. He is a man in a low rank of life, and he would have betrayed his duty to himself and to his family, if he had not taken up the case, even if it had only been to acquire this young lady's own share of the fortune.

But, in point of fact, his patrimonial interest is much more important than that which the brother had in the case. The advantage which my client expects from this action, is not so much that of getting her share of the estate, but that of her brother, who, through the death of an uncle, acquired another estate, much more valuable than the one which he got from his father, to which my client is the heir-at-law, without taking any thing by or through the defender's mother. This is an object which it is impossible that any man in the situation of my client should fail to claim, without a dereliction of his own right and the

rights of his family. If any thing improper, or any thing which could weigh with your Lordships in the decision of this case was done by any body else, I am sure, at least, that no accusation of improper conduct can be laid to the charge of my client. But I should make an apology to your Lordships for saying any thing on such matters as this, in a question which must regulate you in all matters in which the same point of law may hereafter occur for decision; and I shall therefore return to the general question which is proposed for discussion, and not take up your time with any thing more of a foreign nature.

The plea of the defender is, That the ignorance of one of the parties to a putative marriage, of the other party having been previously married to another person still in life, is relevant to infer the legitimacy of the children of that putative marriage.

This is a plea confessedly founded on the Canon law. It is admitted that it is unsupported by our own law,—for the gentlemen do not say that there is one statute, nor one decided case, on the subject. Whether it is well or ill founded, it rests altogether on the authority of the Canon law.

I shall therefore begin with considering how far that law has any authority in this country, in a question to which it has never yet been applied by any statute or decision of our own.

On the Canon law, as an enlightened system of jurisprudence and equity, your Lordships heard a very able eulogium pronounced by my friend Mr Thomson. To my shame I confess that I am not able to judge of the propriety of that eulogium; for I really am very ignorant with regard to the Canon law. I made an attempt yesterday to learn something about it, but I am sorry to say that I totally failed in doing so. The first book which I was referred to was one in thirty volumes folio, into which it was of course impossible

for me to enter on so short a notice; and I was told that there were two other writers on the same law of nearly equal length; and that, with regard to two of the three, they were always directly at variance with each other. I was told, that if I wished to get the opinion of two of them, I only required to read one; for I might depend upon it, that it was an infallible rule, that the opinion of the one would be just the reverse in every particular from that of the other.

It is said, however, that this law, be its merits what they may, is the law of all civilized Christian countries excepting England. That opinion, I conceive, to be quite unfounded; and I shall endeavour to shew, that the very reverse is the fact, and that the Canon law is of much greater authority in England than in Scotland.

My learned friends wish to shew two things: 1*st*, That the Canon law is the law of Scotland; and, 2*d*, That it is not the law of England. This argument is necessary for their success. But I shall shew that it is not the law of either of the countries; but that it is, at any rate, of more authority in England than in Scotland; and yet, in England, they reject the doctrine which is here contended for by the defenders.

If the Canon law really had that authority which my friend says it has, I should have expected that some means would have been taken to make us acquainted with it. Questions of this description are exceedingly important. Yet, more important, as, in this view of the matter, the Canon law undoubtedly is than the Civil law, we have professors of the one law in our Universities, and none of the other; and, with the exception of my friend Mr Thomson, I know of no one who has even professed to study the Canon law privately; and yet we are told, that it is the regulating law in all questions of *status* and legitimation. The authority of the Council of Trent was never acknow-

ledged in this country; and yet we are told, that the Canon law, which it introduced, is binding upon us.

Having made these general remarks, I shall now proceed to consider the authorities which have been referred to by the defenders.

The favourite author referred to by my friend, was Sir Thomas Craig *. It is quite true that he says, "Hujus "sane juris pontificii magna adhuc (licet jugum pontifici- "um excusserimus) apud nos manet auctoritas, adeo ut "quoties a civili jure dissidet (ut sæpe fit, extentque libri "scripti de differentiis juris Civilis et Canonici) jus canoni- "cum præferamus." But your Lordships will observe, that that doctrine is qualified by the words which follow it. "Itaque quoties de administranda ecclesia agitur, qui ani- "marum curæ præficiendi sunt, qui beneficiis, quibus be- "neficia debentur, de advocationibus ecclesiarum, sive de "jure patronatus, de testamentis, de matrimonio vel contra- "hendo vel dissolvendo, qui legitimi censeantur, in his jus "pontificium, mutatis sive antiquatis nonnullis, adhuc se- "quimur." It should also be observed, that Craig's foreign education has led him into many errors. It is well known that he passed a considerable part of his life in foreign and Catholic countries, which was the cause of his making many mistakes as to the law of Scotland; and, of these mistakes, the passage which I have now read was evidently one; for he says, what we all know to be totally unfounded, that, where they differ, we prefer the Canon law to the Civil.

When Craig carries his doctrine so far as this, I pray your Lordships to remark, that he differs in one respect from the defenders; for they say, that the Canon law is of no authority in England; but Craig says just the reverse †. In a division of his work, which is entitled, "Quo

* B. i. dieg 3. sect. 24. † Lib. i. dieg. 7. sect. 23.

" tempore jus feudale in Britanniam pervenit, et quo jure " Angli hodie utuntur," and when treating of the use of the Canon Law in England, he says, " Habet autem hoc " jus canonicum suum locum in omnibus consistoriis Ar- " chiepiscoporum et Episcoporum, et præcipue si de de- " cimis agatur, sive de administratione rerum ecclesiasti- " carum, aut ipsarum ecclesiarum; sic in quæstionibus et " controversiis matrimonialibus, nempe in sponsalibus, ma- " trimoniis, dotibus, qui filii sint legitimi, et similibus." Here, he says that the Canon law is adopted in England in all questions of the present description; in short, in all questions relative to the *status* of persons.

The fact is, that Craig is completely mistaken, both as to the law of England, and as to the law of Scotland. He gives the Canon law the same authority in both, that it has in the Catholic countries, in which he lived and got his education, and which has led him into the mistake which I have now noticed.

On other points of this kind, also, Craig is quite wrong.

He says *, that the Canon Law, and the Books of the Feus, are the common law of Scotland, which it is unnecessary to say is a complete mistake.

Such are the errors of Craig, all derived from his foreign education and foreign habits.

It is not, therefore, from Craig, filled as he is with such erroneous notions, that just ideas on this subject can be expected. Your Lordships must look to other sources, more pure than him, and less full of foreign views. The Canon law is of no direct authority in this country. We do not admit the source from which it proceeds, as of any authority with us. That it may be followed as of great weight with us, in the words of Stair, is true in two cases,

* Lib. i. dieg. 8. sect. 16.

but that is making it a very different thing from an authority. These are, 1*st*, Where it had been followed and acted upon by the tribunals of this country; that is, where it has already been adopted as law, in cases where it was applied when the Canon law was in full vigour. In such situations, it is still followed by our courts, excepting in matters which have been differently ruled since then.

2*d*, The Canon law may also be used in this country, in those cases where our courts have never decided any particular question, and where the Canon law is found to be most just and consistent with the common principles of law and reason, and expedient to be applied to the case. But, in this last case, it is not, by any means, used as an authority, but only as supplying rules which the Judges of this country may receive from their equity, and which they would have found out of themselves, by their own deliberation, were they not saved that trouble, by finding them already used in another system of laws.

I conceive that the doctrines of the answer, which I have now attempted to give to this part of Mr Thomson's argument, may be fairly gathered from what Lord Stair says*: "Our customs, as they have arisen mainly from equity, so "they are also from the Civil, Canon, and Feudal laws, from "which the terms, tenors and forms of them are much bor-"rowed; and therefore, these (especially the Civil law) have "great weight with us, namely, in cases where a custom is "not yet formed. But none of these laws have with us the "authority of law, and therefore are only received accord-"ing to their equity and expediency, *secundum bonum et* "*æquum*. And though it may appear, from some narratives "of our statutes, that the Parliament doth own the Civil

* L. i. tit. 1. § 16.

" and Canon laws to be our law, as in, &c., yet that " amounts to no more, than that those laws are an example, " after the similitude whereof the Parliament proceeded. " And though, in cases of falsehood, the punishment be as- " sumed, as in the Civil *and Canon* law, which *will* make " that a part of our law, yet it will not infer, that, even in " so far it was our law before, much less *in* the whole." And here I beg leave to observe, that there is an interpolation, in Stair, of the words *and Canon*, printed in Italics, which seems not to have been in the first edition. Stair proceeds: " And there is reason for the abrogation of the " Canon law at the establishment of the Protestant religion, " because, in the Popish church, it was held as an authori- " tative law; but since it is only esteemed a law as to those " cases that were acted by it when it was in vigour." I pray your Lordships to attend to the words here used. He says, first, that these laws were only to be received *secundum bonum et æquum*; and, second, that it is only esteemed to be law in those cases which were acted by it when it was in vigour. And he proceeds: " And in the rest, only as our customs " assume some particulars thereof, according to the weight " of the matter. But for the full evidence of the contrary, " there is an express and special statute, declaring this " kingdom subject only to the King's laws, and to no other " sovereign's laws."

All that this amounts to, is, that the Canon law is useful for suggesting principles of equity in new cases, to which your Lordships' own genius and attention would be turned, if you had not that help. The act that Stair refers to is very short, and I shall read it to your Lordships, for the honour of our ancestors. It was passed at the time when the authority and influence of the Popes were in full vigour, and yet our ancestors had the spirit to reject every law which they did not conceive to be in unison with their own.

It was the statute 1425, cap. 48., and is in these terms: "That all the Kingis lieges live and be governed by the "laws of the realm. *Item*, It is ordained be the King, be "consent and deliverance of the three Estaites, that all and "sindrie the Kingis lieges of the realme live and be go- "verned under the Kingis lawes and statutes of the realme "allanerlie: and under na particular lawes, nor special "priviledge, nor be na lawes of uther countries nor "realmes."

This act is just as good evidence, in my mind, of the spirit of our law, as the celebrated *Nolumus Leges Angliæ mutare* of the Barons of England was of theirs; and it is also quite agreeable to the doctrine of Stair, who says, that the Canon law is of no authority, excepting where it has been acted on, or where it has been recognised to be law by our ancestors.

Stair also says, "especially the Civil law" has great weight with us, but according to the doctrine of Craig it has less than the Canon law.

There is another passage in Stair *, which I shall take the liberty of reading, as to the matter of marriage, where he prefers the Civil law to the Canon. "For clearing "whereof consider, that it is not every consent to the mar- "ried state that makes matrimony, but a consent *de præ- "senti*, and not a promise *de futuro matrimonio:* for this "promise is only the espousals, which are premised to mar- "riage, that so solemn an act might be with due delibera- "tion. And therefore, though as other promises and pac- "tions, espousals are naturally obligatory, and effectual "also by the Canon law, whereby the espoused persons "may be compelled to perfect the marriage, unless there "arise some eminent discovery, of the corruption or pollu-

* B. i. tit. 4. § 6.

" tion of either party, or defect or deformity through sick-
" ness or accident; yet by the Civil law, there is place for
" either party to repent, and renounce the espousals, which
" is also the custom of this nation: for marriage uses not
" to be pursued before solemnization *rebus integris*. So
" that the marriage itself consists not in the promise, but
" in the present consent, whereby they accept each other
" as husband and wife."

Here your Lordships see, where the two laws hold opposite doctrines, we are told by Stair, that our law gives the preference to the Civil.

Mackenzie's doctrine on the general point is quite the same. He says *, " The Popes of Rome, in imitation of
" the Civil law, made a body of law of their own, which,
" because it was compiled by churchmen, was called the
" Canon law; and though it has here no positive authority,
" as being compiled by private persons at the desire of the
" Popes, especially since the Reformation, yet our eccle-
" siastic rights were settled thereby before the Reforma-
" tion; and because many things in that law were founded
" upon material justice, and exactly calculated for all
" churchmen, therefore that law is yet much respected
" among us, especially in what relates to conscience and
" ecclesiastic rights."

This passage completely coincides with the opinion of Stair, that the Canon law is of no authority with us, excepting *secundum bonum et æquum*.

I conclude, therefore, according to Stair,

1*st*, That the authority of the Canon law is inferior, with us, to that of the Civil law.

2*dly*, That it is only where it was acted upon, when it was in full vigour, that we receive it as of any authority.

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* B. i. tit. 1. s. 8.

3dly, That in all other cases, where recurrence is made to the Canon law, it is only done as to a source from which equitable doctrines may be derived, and which may be received or not, according to the sound discretion of the judge.

This is the whole amount of the authority of that law, as laid down by Stair, and all the subsequent writers on our law.

I shall now call your Lordships' attention to the authority of the Canon law in England, and I shall shew that it is of more authority there than in this country; and, for this purpose, I will read a passage from a book, than which no higher authority can be quoted on the law of England,—I mean Hales's History of the Common Law; and I pray your Lordships to attend to the wonderful similarity between his doctrine and that of Stair; and, at the same time that he agrees with Stair, your Lordships will also perceive how completely he differs from Craig. He says *, "But I have, for the following reason, ranged these "laws among the unwritten laws of England, viz. be- "cause it is most plain, that neither the Canon law nor "the Civil law have any obligation as laws within this "kingdom, upon any account that the Popes or Emperors "made those laws, canons, rescripts, or determinations, or "because Justinian compiled their *corpus juris civilis*, and "by his edicts confirmed and published the same as authen- "tical, or because this or that Council or Pope made those "or these canons or decrees, or because Gratian, or Gre- "gory, or Boniface, or Clement, did, as much as in them "lay, authenticate this or that body of canons or institu- "tions; for the King of England does not recognize any "foreign authority, as superior or equal to him in this "kingdom; neither do any laws of the Pope or Emperor,

* Chap. ii. p. 24.

" as they are such, bind here: but all the strength that " either the Papal or Imperial laws have obtained in this " kingdom, is only because they have been received and " admitted, either by the consent of Parliament, and so are " part of the statute laws of the kingdom, or else by im- " memorial usage and custom in some particular cases and " courts, and no otherwise; and, therefore, so far as such " laws are received and allowed of here, so far they obtain, " and no farther; and the authority and force they have " here, is not founded on or derived from themselves; for " they bind no more with us, than our laws bind in " Rome or Italy. But their authority is founded merely " on their being admitted and received by us, which alone " gives them their authoritative essence, and qualifies their " obligation."

In a subsequent passage, he mentions the Courts in which the Canon law is received, viz. all ecclesiastical Courts; and he proceeds *:—" The rule by which they pro- " ceed is the Canon law, but not in its full latitude, and " only so far as it stands uncorrected, either by contrary " acts of Parliament, or the common law and custom of " England; for there are divers canons made in ancient " times, and decretals of the Popes, that never were ad- " mitted here in England, and particularly in relation to " tythes; many things being, by our laws, privileged from " tythes, which, by the Canon law, are chargeable (as tim- " ber, ore, coals, &c.), without a special custom subjecting " them thereunto."

Compare the two authors together, and your Lordships will see that the doctrines of Stair and Hales completely coincide and agree. There is a wonderful similarity between them, and I have no doubt that they wrote their two books without any concert together.

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* Page 28.

I conceive, also, that your Lordships must be satisfied, from what I have now read, that I was right in saying that the Canon law is of more authority in England than in Scotland: for Stair says, that it is only an authority here, in those cases in which *it was* recognized and acted upon when it was in full vigour. But Hales again says, that, in the Consistorial Courts of England, it is received as law, *unless* there be some contrary law, which shews that more faith is given to the Canon law in England than in Scotland. In England it is received where *it* is not contrary to law, and here it is only received where it has been expressly recognized by a decision of this Court, or by act of Parliament.

The same proposition is clear from other sources. I might easily mention many examples of this. For instance, as to sponsalia, we have rejected the Canon law altogether, and have adopted the Civil law on that point. The Canon law bound parties to each other, by means of sponsalia; and your Lordships know, that, till the passing of the marriage act in England, sponsalia were as binding with them as marriage itself; while, in Scotland, where the defenders maintain that the Canon law is all-powerful, we never, at any one time, adopted their law upon this point; but, in preference to it, we had recourse to the Civil law. Here the defender's doctrine is quite the reverse of the truth. On this point, the English pay much more respect to the Canon law than the Scotch do.

As to the doctrine of divorces, also, we have never followed the Canon law. By the Canon law, no divorce is permitted excepting *a mensa et thoro*. That is also the law of England to this day, but it never was the law of Scotland; and we have here, as well as in other important particulars, rejected the authority of the Canon law.

I cannot even find any one instance in which we have adopted the Canon law in preference to the Civil. But

it is said by the defenders, that we adopted our doctrine of legitimation *per subsequens matrimonium*, from that law. But, if your Lordships will look into what is stated by Stair and Erskine upon this matter, you will see that we borrowed that doctrine also from the Civil, and not from the Canon law. The Canon law did the same thing it is true; but we got it from the Civil law, its original source, and not from the Canon law.

The Canon law, therefore, is of more force in England than it is here. That is a consideration of great consequence in this case, where your Lordships are called on to give effect to a rule of law, on no other ground than that it is a rule of the Canon law. Merely as such, it ought to have more effect in England than in Scotland. But, as it has no effect on this point in England, your Lordships will judge of its force, and say whether it ought now, for the first time, to be adopted in a court in Scotland.

That, in this matter, the Canon law is not the law of England, I should think, is sufficiently made out by Sir Samuel Romilly's opinion. Upon this head, I need not detain your Lordships; but still, as the defenders have referred to an English case, in aid of their plea, it will be proper to take some notice of it. "A woman was supposed "to marry A first, and afterwards, during his life, to mar- "ry B; and, in a cause of jactitation of marriage in the "spiritual court in Ireland, the first marriage was affirmed; "but, on an appeal to the Delegates in Ireland, the same "was disallowed, and the second marriage adjudged good. "By the second marriage there was issue, but none by the "first."

"And now there was a petition for a commission of re- "view to reverse this last sentence of the Delegates in Ire- "land.

"Lord CHANCELLOR KING.—A commission of review

" is not a matter of right, but purely in the discretion of " the Crown; and there being issue by the last marriage, " and none by the pretended first marriage, this commis- " sion of review tends to bastardize and render illegitimate " the innocent issue by the last marriage, which ought not " to be favoured; so that I am against granting this com- " mission, and shall advise the Crown accordingly."

On attending to this case, it is quite astonishing to me that the defenders should have quoted it as an authority. The question decided in Ireland was one not of law, but of evidence; as to whether the first marriage was a good one or not, and the Court of the Delegates decided, that it was not, and that the second was. When it is brought to appeal, does Lord Chancellor King decide it upon any principle of law? By no means. He refuses to entertain the question at all. He says it is merely matter of discretion to review such questions, and he refuses to consider it at all. If he had considered the case in a legal point of view, his decision might have afforded some kind of authority to the defenders, but your Lordships will attend to what he did. The question was as to the granting a commission of review in a matter of fact, which had been determined by the inferior Court. What was the refusal of Lord King to grant that commission founded on? It was just because he held a quite different view of the law, from that which the defenders now wish your Lordships to believe that he did. He says, You the Delegates have decided the question in favour of the second marriage. If I enter into a consideration of the matter, I may be obliged to decide it in favour of the first marriage, and that would bastardize the issue of the second. And as I don't think that would be equitable, and as I have power to refuse to examine it, I won't entertain the question at all.— I submit to your Lordships, that this is a case of all others the most hostile to the defenders' argument.

I may also call your Lordships' attention to a case in Comyn's Digest, which was not read by the defenders' counsel, which shews the opinion of the lawyers of England, and how widely different it is from that which is now attributed to them. The case to which I allude, I do not give as by any means determining the present question; but I consider it valuable, as shewing the ideas which English lawyers entertain on a point which closely resembles it. It does not relate to the children, but it shews the estimation in which the wife was held*. "If a woman marry a second husband, living the first, and the second not privy, she is, during the cohabitation, to be considered as a servant to him, and he is entitled to the benefit of her labour."

This is pretty strong certainly. We are not here carrying our doctrine so far; but your Lordships are gravely told, that the son of a woman who is considered in England as the servant of the father, is to be considered as a lawful child.

I am now, in the second place, to proceed to consider the particular doctrine of the Canon law, which has been brought forward by the defenders, for I have hitherto been treating of the general authority of that law. And before proceeding to a more particular examination of the defenders' plea, it will be of some consequence to ascertain what the Canon law is upon this subject, for that seems to me to be a matter of more doubt than the defenders are or affect to be aware of.

In order to give effect to this argument at all, the canonists held, that the second marriage should be a regular, public marriage, celebrated *palam et in facie totius ecclesiæ*.

* Comyn, vol. ii. p. 76.

If this had not been the case, then all effect was denied to the marriage by the Canon law.

Your Lordships will find this proposition laid down by Cujacius himself, the learned author so much relied on by my friend Mr Thomson in his pleading. Even in the passage which he quoted, he says that the marriage was made "palam in conspectu ecclesiæ." And he says *, "*excusata eorum ignorantia non est qui clam rem gerunt.* Cur "enim clam? Quia sentiunt subesse periculum, aut impedimentum aliquod. Nihil ergo prætextus ignorantiæ "eis prodest, quæ non est probabilis, quæ affectata est potius. *At si factum matrimonium palam in conspectu totius "ecclesiæ*, etiamsi postea emergente, et patefacto impedimento, aliquo divortium intercesserit ex sententia ecclesiæ, "interim ex eo concepti, non tantum nati, sed etiam concepti liberi, non sint illegitimi. *In iis, qui palam rem "gesserint ignorantia excusatur:* scientes autem non excusantur, etiamsi palam coierint matrimonium: Multum interest, quid fiat clam, an in propatulo: quæquid "faciunt palam, etiamsi quod faciunt non sit legitimum, "tanquam errantes excusantur, aut mitius puniuntur: qui "clam, tanquam contumaces gravius coercentur. Ult. de "rit. nupt. ubi differentiam facit inter eos, qui scientes, et "eos qui ignorantes in incesti crimen incidunt."

Here, then, the doctrine is clearly laid down, that, in order to raise the plea of *bona fides*, the marriage must be made in the face of the whole Church. In the present case, the marriage, in one point of view to be sure, was not a private one, but in another it was. And I only request your Lordships to say, whether, in such a case as this, the Canon law would have given any effect to the plea of *bona fides*.

* Page 271, ad cap. ii. de Clandestina desponsat.

Another doubt also occurs, which I must state to your Lordships. It is a disputed matter among the Doctors and Commentators on the Canon law, whether the children of such a marriage are legitimate, in regard to the parent who is not *in bona fide*, as well as in regard to the parent who is. By many they are held to be *pro parte legitimi, pro parte illegitimi*, and this dispute is referred to by D'Auesseau in the very same pleading quoted by Mr Thomson*. In the text he says, " La difficulté a paru plus grande, " lorsqu'elle n'etoit que dans une des deux contractants ; et " dans ce cas quelques anciens glossateurs divisoient l'etat " des enfants, en les regardant commes legitimes par rap- " port à l'un, illegitimes par rapport à l'autre. Mais il " etoit absurde qu'un meme homme fut partim legitimus, " partim illegitimus."

But in a note on this passage it is said, " Il ne s'agit ici " que de l'etat et de la qualité de legitime, et non de la " question de sçavoir, si dans ce cas ces enfants succédent " également à celui qui etoit de mauvaise foi, comme à " celui qui étoit de bonne foi. C'est un point qui n'avoit " pas été agité dans cette cause."

Further, your Lordships will observe, that D'Aguesseau gives no opinion, excepting as counsel in the cause. But the matter now in dispute was not there decided or argued, and, in the note, he must be held to have given a more impartial opinion; and there he puts in an express caution, that he had only been speaking to the *quæstio status*, and not to the right of succession. He therefore just leaves the question where he found it, as a matter of great doubt, among the writers on the Canon law. This is a most important doubt in the present question. It goes to the very root of the

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* Vol. iv. p. 279.

matter; for it is the right to the estate of the *mala fide* parent that is now in dispute.

The defenders have required your Lordships to throw this doubt altogether out of view,—to adopt the Canon law *de plano* according to their account of it,—and to apply it to a case of a totally different kind from one *palam et in facie totius ecclesiæ*. In short, you are totally to disregard this most important doubt, which they must admit to have been entertained by many of the writers on the Canon law. And on what authority do they require your Lordships to do so? The first authority to which they refer, is that of the *Regiam Majestatem*. And by it, we are told, not only that the general reception of the Canon law is proved, but that this particular rule, and the reception of it in our law, is also made out. I shall select the passage founded on by the other party *. "Idem dico, si fuerit ab eo separata propter parentelam. Et tamen liberi ejus possunt esse hæredes, et de jure regni patri succedent, jure hæreditario."

Now this passage certainly, in cases of divorce *ob parentelam*, lays down the defenders' rule. But your Lordships will observe, that even, according to the law of England, such a marriage would not he null, but only voidable; and therefore this passage would be good law even there. That law, when relations intermarry, even without the excuse of *bona fides*, does not hold the marriage to be null but only voidable; and while the marriage stands at all, it is held to be good to all intents and purposes. Until divorce, both children and parents have all the rights consequent upon the most lawful marriage; and if one of the parents die before divorce, no divorce can be got at all, and the *status* of the children becomes from thenceforward unimpeachable.

* Lib. ii. cap. 17. sect. 74.

I submit, therefore, my Lords, that what is stated by my learned friends as the law of Scotland, applicable to the present case, is truly the law of England, not applicable to the present question, but to one of a different kind altogether. There are thus two fatal objections perfectly sufficient for my purpose. One, that it is not the law of Scotland, the other, that it does not apply to the question.

To shew your Lordships how far the *Regiam Majestatem* can be held as stating the law of Scotland with regard to marriage, or how far the Canon law was received by the law of Scotland, I may refer to chapter 51. of the same book, entitled, "Qui Filii sunt legitimi," where it is said: "Circa hoc orta est quæstio. Si quis, antequam pater et "matrem ejus desponsaverit, fuerit genitus et natus; "utrum talis filius sit hæres legitimus; cum postea pater "ille, matrem ipsius desponsaverit? Et quidem licet se- "cundum Canones et leges Romanas talis filius sit hæres "legitimus." What is the law of Scotland on this matter? "Tamen secundum jus et consuetudinem regni, nullo mo- "do in hæreditatem, tanquam hæres sustineri potest, nec "hæreditatem petere."

Here your Lordships are told, that legitimation *per subsequens matrimonium* is totally rejected. In short, this is just a statement of the law of England in those days on the subject of marriage. In both cases the *Regiam* agrees with the law of England, and in both it is totally contrary to the law of Scotland.

Lord Justice-Clerk.—Were not the laws of England and of Scotland at that time the same with regard to marriage?

Mr Gillies.—Not for any thing that we know. The

laws of the two countries must be presumed to have been the same then as they are now, for we know nothing to the contrary. This is just a statement of the law of England, and it is quite adverse to every authority that we are acquainted with in the law of Scotland.

Another great authority to which the defenders have referred on this subject is Sir Thomas Craig. I do not mean to go over all that he has said on the matter, but your Lordships will find it on pages 370, 371, and 372.

He first states the Civil and Canon laws, and then he adds, with regard to the law of Scotland, certain words, to which it is material that your Lordships should attend: "Hæc sunt quæ de bastardis tam jure Civili quam Canonico, quo hodie utimur præsribuntur."

Parties differ as to the meaning of *quo hodie utimur*. The defenders say, that it refers to the *Jus Canonicum*, and not to the *Jus Civile*, and that Craig's meaning was to prefer the one of them to the other. What I submit to your Lordships is, that in every rule of fair legitimate construction, *quo hodie utimur* refers here both to the Civil and to the Canon law.

The inference from this is very important. If we are right in our interpretation of the passage, it follows, that the whole of Craig's doctrine is fundamentally erroneous, and must, of necessity, be entirely disregarded; because it is admitted, that the doctrine, of which he speaks, was rejected in the Civil law.

But whether the passage be interpreted in this way or not, is really not of much consequence; for it has been shewn already, that, from his foreign education, Craig ranked many things among the laws of Scotland which he ought not to have done, and therefore his unsupported opinion can carry very little weight.

Lord JUSTICE-CLERK.—I think *quo hodie utimur* applies to what goes before both.

Mr GILLIES.—I conceive it applies to both.

Lord JUSTICE-CLERK.—I don't think so.

Lord MEADOWBANK.—No: He says habitually *Jus Civile, Jus Canonicum*; he does not say *jura*.

Mr GILLIES.—I do not hold it to be of much consequence. There are many errors in the law, as delivered by Sir Thomas Craig, which have been detected by later writers.

I will not trouble your Lordships at this hour, with calling your attention to the particular passages of Stair, Bankton, and Erskine.

Stair * merely states this doctrine as the opinion of Craig and the Canonists, and your Lordships will, at the same time, take into your consideration the passages which I formerly read to you, as to his general estimation of the Canon law. I beg you to consider the two passages together. The natural inference to be drawn from them is, that Stair did not hold this rule of the Canon law to have been admitted into this country; for it does not fall within that class of cases which was introduced and acted upon when the Canon law was in full vigour, which he says are the only cases in which it can now be admitted as an authority.

I leave Erskine and Bankton to your Lordships without any remark.

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* Book iii. t. 3. sect. 42.

The only decided case which is in any respect applicable to the present, is that of Campbell of Carrick, which has been already read to your Lordships, and there you have only the *obiter dictum* of a minority of the Court. But no decision was, or could be, pronounced in that case, applicable to the present question. And the case having gone to the House of Lords, the interlocutor, which, after all, was founded merely on a personal objection, was altered, and a proof of the first marriage was allowed. And, if I remember rightly, the second marriage was ultimately found to be proved, while the first one was not.

Lord MEADOWBANK.—It is stated on high authority, that the real question there was the *quæstio status*, and it was held to be quite clear, that nothing whatever could bar a party from proving her *status*.

Mr GILLIES.—It is more particularly necessary for your Lordships to attend to one point in that case, which was very different from the present, and a point which is not settled by the Canon law at all. Both of the parties in that case alleged that they had been married. But Mrs Cochrane, who claimed to have been the first wife, did not pretend that she had been married *in facie ecclesiæ*,—for she rested her whole case on an endeavour to make out a marriage by facts and circumstances.

A party who marries another, in the belief that there was no prior marriage, may have some excuse, if the first marriage was a private one, or if it was only made out by facts and circumstances; but there can be no such excuse, where the first marriage was celebrated publicly, or *in facie ecclesiæ*; for though parties might, *de facto*, be ignorant of it, yet, as every one is legally bound to know

it, there could be no room for legal difficulty in the matter. And, my Lords, I really, after all, do not know how far the Canon law applies to this case at all,—for, while the Canon law declares the second marriage to be good, on account of the party's *bona fide* ignorance of the first, we are left quite in the dark as to the nature of the first marriages in those cases in which those judgments were pronounced. The prior marriages may have been private ones, in all those cases in which the second ones were held to be good.

Lord JUSTICE-CLERK.—Did they hold private marriages to be good in any case?

Mr GILLIES.—Yes, they held *mere sponsalia* to be as binding and effectual as an actual marriage,—and my friend Mr Cranstoun tells me just now, that private marriages were just as good as public ones.

My Lords, I do not know, that, in the rescript of Innocent III., there is any thing to shew that the first marriage was a public one. Your Lordships are therefore called upon to go farther with the Canon law than it is yet proved that the canonists themselves ever went. In the present case, the second marriage was a public one *de jure*, no doubt, but, *de facto*, it was quite a private one; and when the Canon law, as has been seen, reprobates the plea of *bona fides*, in cases of the second marriage being private, can your Lordships believe that they would have held this to be a sound plea, at the instance of any person pleading upon a marriage, which was private *de facto*?

In short, in either view,—whether with regard to the first, or with regard to the second marriage,—we are totally ignorant how the Canon law really stood in such cases as the present; and your Lordships are now called on to apply

that law to a case in which, if Innocent III. himself were now sitting in judgment, it is more than probable that he would refuse to do it.

All-powerful as the defenders hold the Canon law to be, there are points of it which I conceive they would hardly venture to press upon your Lordships.

First, I see it is an express doctrine of the Canon law, that a woman who *bona fide* marries a man, whose first wife is alive, cannot recover her dower:—her children are to be legitimate, but she herself has no redress.—Is that a doctrine of the law of Scotland?

Another rule of the Canon law is quite consistent with this; indeed, it almost necessarily follows from it. It is held by all the canonists that the issue is legitimate, in cases of rape, for there the woman is quite *in bona fide*. Is that a doctrine of the law of Scotland?

Another rule of the Canon law is contained in the Decretals*. I will not read it, but the title gives a very good account of the whole chapter, "Matrimonium "separatur propter adulterium mulieris: et si vir postea "fornicetur, redintegratur." I presume we shall have this rule introduced into the law of Scotland, and it will have very important effects. Why it should not, I am not able to figure, if there is any force at all in the principles and arguments upon which your Lordships are required to receive the doctrines of the Canon law in the matter now before you.

But, I submit to your Lordships, that the Canon law is not the law of Scotland, nor of any civilised country, in which the authority of the Popes is not recognised as infallible; and on this point I beg you again to con-

* Corpus Juris Canonicæ, lib. iv. tit. 19. cap. 5.

sider the parallel which I formerly drew between the writings of Lord Stair and of Sir Mathew Hale.

If any decision in point to the present question could be pointed out, your Lordships would give due weight to it; but it is not maintained that there is any such. The case, therefore, is entirely open, and, consequently, it does not belong to that class of cases in which Lord Stair says the Canon law was received and acted upon by our courts, when it was in full vigour. And, therefore, your Lordships are to consider, in the *last* place, if this is one of those cases in which the rules of the Canon law ought to be now adopted for the first time, as being *secundum bonum et æquum.*

As to the principles of law, I conceive that the rule here contended for by the defenders, is quite at variance with every principle of the law of Scotland. It is clear, that no legal deduction, and no legal effect, can follow from any thing which is quite contrary to all law. Here the legitimacy of the child is said to arise from a marriage, which, according to our law, must be admitted to be null and void. But we admit of no legitimacy, excepting through the means of a regular, or rather of a legal marriage; and this marriage is utterly null and void.

The defenders have affected to misunderstand the doctrine of the law of England as to this point of the difference between null and void, and to apply to a null marriage those rules which in England are only applied to a voidable one.

Lord Justice-Clerk.—I wish to know the principle on which the English law holds, that a marriage with a man's mother or his sister is good till it is reduced, and yet that a second marriage, standing the first, is not good. We all know the meaning of the words "null and voidable," but

what is the meaning of the distinction between the two in point of principle, as applied to the law of marriage?

Mr GILLIES.—The fact is the great matter here, my Lord; for it is only by way of illustration that the matter comes in at all. As to the cause of the distinction.—The rule was introduced at a time when the Pope had complete authority in England.—He could, by means of a dispensation, enable any man to marry his mother; but he could not enable him to marry two wives at the same time. He could dispense with the crime of incest; but he could not dispense with bigamy.

Lord MEADOWBANK.—Was not our law of incest introduced prior to the Reformation?

Lord NEWTON.—I am not sure but that the distinction, the meaning of which is asked by my Lord Justice-Clerk, may be owing to this,—that marriage is a sacrament by the Popish law; and, I suppose, the Popes could not dispense with a sacrament, though they might dispense with every thing else.

Mr GILLIES.—The fact of the distinction being made out, is all that we contend for; because the fact is enough for our purpose. If we can shew that this is a null marriage, we must gain our cause.

Another rule of law is, that *Unusquisque contrahens præsumitur scire conditionem ejus cum quo contrahit.* Now, in the case of the first marriage being a private one, the lady might have no means of knowing the fact; and the Canonists may have held that that was a sufficient excuse. But, in the case of a public marriage, she might have known it; and, at any rate, the law would hold that she was bound to know it.

Another thing which requires to be noticed, is the person in whose behalf the *bona fides* is pleaded. This is a case where the benefit is asked from the *bona fides* of one person, in favour of a different party altogether,—in favour of the joint child of her who was not, as well as of him who was, *in bona fide*. But *bona fides* is not peculiar to the children of such persons as this. We all know that all children are *in bona fide*. It is impossible that a child should be otherwise. The hard situation of bastards, who are punished for no fault of their own, is what every man of every feeling or reflection must be struck with; and yet no man ever thought of pleading *bona fides* in favour of them. And what is the principle on which we have any bastards at all? Why, as they are all equally innocent, do we make any distinction between them and lawful children. I can see but one reason, and it is one which applies with equal force to such children as the defender. It is to encourage marriages, and to discourage and check, as much as possible, the pernicious intercourse of the sexes. And it is a very powerful check. Persons whom no other motive can restrain, who are utterly regardless of the consequences to themselves, either in this world or the next, may yet be restrained by the consequences which it is to produce on their children. This seems to me to be the foundation of the rule by which bastardy has been introduced into the law of Scotland; and from which it is recognised as the law of every Christian state. And is there any thing that attaches to the offspring of such a marriage as this, which can induce your Lordships to do more for them than you would do for any other natural children? I humbly apprehend there is not; and that no plea can be advanced in favour of the one, that would not just be equally strong in favour of the other.

Your Lordships, on this occasion, are, in some measure, sitting as legislators; and you are called on to say, whether certain rules ought to be introduced into the law of Scotland, or not, which, certainly, never were received before. And really the views of expediency, analogy and principle, strike me so strongly, that, if the matter was to be brought before the Legislature,—and, if a bill were to be introduced into Parliament, declaring, that the children of such marriages as this were to be held legitimate, I think the title of such a bill ought to be,—An Act for the Encouragement of Adultery.

Your Lordships will consider, what the consequences would be. They were very ably pointed out by Mr Jeffrey. A man wanting to disappoint his daughter, or his brother, or any collateral relation, or even with no other wish than a very common one, of having heirs of his own body, may just change his name and place of residence, and marry women in all parts of the country, all of them capable of bringing him children who will be lawful. Or he would have no occasion to be at the trouble of marrying. A man may keep mistresses all over the country, and he may marry any one of them after she has brought him a son. And that marrying in disguise in this way, is no new thing, your Lordships all know. You all recollect the story of a Nobleman of high rank, who adopted a different name; and, in the character of a farmer, married a farmer's daughter. It is true, his Lordship did this from romantic, and not from improper, motives; but what is to prevent other men from doing it with the very worst motives.

Lord Justice-Clerk.—His Lordship was concealing himself during the life of his uncle. His acquaintance with his wife was accidental.

Mr Gillies.—But there is express evidence that the Legislature of this country has no idea that any such plea as this can be maintained, or, strictly speaking, there is evidence of their being satisfied that it cannot. I allude to the statute 12th Geo. III. cap. 11., to which I must pray your Lordships to attend, and then I shall have very little more to say; it is entitled, "An act for the better regulating the "future marriages of the Royal Family." And the enacting clause is in these words: "And be it enacted, That no "descendant of the body of his late Majesty, King George "the Second, male or female (other than the issue of "Princesses, who have married, or may hereafter marry, in- "to foreign families), shall be capable of contracting matri- "mony without the previous consent of his Majesty, his "heirs or successors, signified under the Great Seal and "declared in Council (which consent, to preserve the me- "mory thereof, is hereby directed to be set out in the license "and register of marriage, and to be entered in the books "of the Privy Council); and that every marriage or matri- "monial contract of any such descendant, without such "consent first had and obtained, shall be null and void, to "all intents and purposes whatsoever."

There is not one word here as to the legitimacy or illegitimacy of the offspring in such a case as this, if any of the descendants of King George II. should choose to disobey the prohibition. And your Lordships will attend to the consequences which might follow from the interpretation of this law in Scotland, under the doctrine now maintained by the defenders.

I hope I may without offence, for I am sure none is meant, put the case of a Prince of that illustrious family, whom I shall suppose to be already married, and to have a daughter by his wife. Let me suppose that this personage should come down to Scotland as Colonel Hope, or

Colonel Anything, and here, in that assumed character, marry a woman, who might *bona fide* believe him to be unmarried, and, in whatever character they may appear, there are no persons who would more readily get wives than the members of that family. Suppose that by this *bona fide* wife his Highness should have a son. That son, under the defender's argument, must, of necessity, be the heir of the kingdom of Scotland, and yet he might not be the heir of the kingdom of England. Any such circumstance as that, might lead to consequences such as every man must shudder at the mere possibility of.

This act of Parliament is valuable to me in another point of view, as shewing the unequivocal sense of the Legislature, that of a null marriage the children must be illegitimate; because if the British Legislature had believed any such argument as that of my learned friend to be possible, they must, of necessity, have provided against it.

Such, then, was the understanding of the Parliament, and such is and has been the understanding of the country for many years past; and I am certain your Lordships will hesitate long before you do any thing to shake or alter it, as you would thereby destroy one of the fairest and most powerful incentives to marriage; the certainty which it gives to every person, entering into that connection, of rearing their family around them undisturbed and uninjured by any concealed or latent claims, and that they cannot be deprived of the respect and station which they are born to hold in society. If you deprive marriage of this, which is one of its greatest and proudest blessings, you will deprive parties of one of the strongest inducements for entering into that state, and will overturn and deface one of the fairest fabrics that ever was raised by the united efforts of morals and of religion.

13*th February* 1811.

Mr Clerk *for the Defenders.*—The subject of the present hearing is, Whether, on the supposition of Mrs ——— having been married prior to her marriage with the defender, his ignorance of that circumstance will have the effect of legitimating the child of the second marriage? The hearing was appointed by an interlocutor in these terms: "The Lords having resumed consideration of the "petition, with answers thereto, condescendence for the "petitioner and answers, before answer appoint counsel "for the parties to be heard in their own presence on the "question, Whether, supposing a prior marriage were "proved to have been entered into between the deceased "and another gentleman, the allegation of ignorance of the "second husband of such prior marriage, at the time when "a marriage was solemnized between him and the deceased, "would be relevant to establish the legitimacy of the de-"fender?"

This interlocutor, no doubt, contains an abstract point of law, and it was upon that point that your Lordships appointed the hearing; but, notwithstanding this, from the manner in which the subject has been treated by the gentlemen who preceded me, the argument cannot be entirely divested of the circumstances of the case. In the way in which I shall treat it, I think it will be rather more divested of them than it has yet been. But there are two circumstances to which I must call your Lordships' attention, in order to define exactly what the question before you is.

And, *first*, the question proposed to us for the hearing, takes it for granted that there was a marriage previously to the one with my client; but your Lordships know, that we have all along denied that there was any prior marriage.

2d, It supposes that my client was ignorant of that alleged prior marriage.

Now, from this state of the question,—while we must, for the present, admit, in argument, that there was a prior marriage,—we cannot possibly admit that it is to be supposed that the prior marriage was a public one, or that it was celebrated *in facie ecclesiæ*. That would be totally contrary to the hypothesis on which we are to argue the case. We must suppose the first marriage not to have been known to the friends of the parties, and not to have been celebrated in such a way as that it could be presumed to have been known to my client, who, some years afterwards, married the same lady. Unless the marriage was of this private kind, there is no room for the supposition of ignorance or *bona fides* on the part of my client.

In the same way also, from the state of the question, we never can admit or suppose that the second marriage with my client was a private one, not celebrated *in facie ecclesiæ*, as was maintained by Mr Gillies yesterday. We must suppose it to have been celebrated *in facie ecclesiæ*. And here I pray your Lordships to recollect a singular inconsistency in Mr Gillies's argument. He maintained that the marriage with my client was a private one, and yet he insisted that the previous marriage was one *in facie ecclesiæ*. Why, my Lords, upon their own shewing, both marriages were exactly of the same description, in so far as the celebration was concerned. They do not pretend to allege any thing else, and yet it was upon this obvious fallacy that Mr Gillies endeavoured to distinguish the one from the other.

Your Lordships must take it for granted, in the present argument, that the first marriage was one quite private, and totally unknown; and it is also clear, that the second must be held to have been a public marriage, perfectly regular in every respect, preceded by proclamation of banns, celebrated by a regular clergyman, in the presence of witnesses; and, in short, that it had every character of publi-

city about it, excepting that it was not performed in presence of the lady's mother.

This, then, is the state of the facts upon which your Lordships have appointed us to be heard in your presence; and the question is, Whether, in such a case, the ignorance or *bona fides* of one of the parents, is sufficient to legitimate the offspring of the second marriage; and, I suppose your Lordships will hold the question to be the same, whether the ignorance was on the part of the mother or of the father. The argument must apply to both, or it must be good for nothing. It is very true, that the modesty of a man is not now reckoned as of so much consequence as that of a woman, but the legal views are the same in both, and the religious interests are just the same; and perhaps, in most cases, it is of more consequence to the father that the children should be legitimate than it is of to the mother.

Before proceeding to my argument, I must also pray your Lordships to observe, that the question now before you is not, Whether the second marriage was lawful? That has nothing to do with the case. The present question is not one as to marriage at all. It is, Whether, in consequence of the connection which these parties contracted with each other, void or not, legal or illegal, the child produced by that connection is to be held legitimate or illegitimate. It is altogether a question of legitimacy, not of marriage. The question is, Whether, when parties suppose themselves to be joined together in the holy state of matrimony, they are to have legitimate or illegitimate children? Whether, in such a case, their children are to be an honour and a comfort to their old age, or whether they are to be a stain and a disgrace to it.

Your Lordships heard it extremely well stated by Mr Thomson, that, in all cases of this kind, the parents, the children, and the State, have all of them an interest in the

question of legitimacy. It is true, that, in one respect, the parents and the State are not so immediately concerned as the children themselves. I mean the *quæstio statûs*; but still, both of them have a very strong interest in the matter. All these things must be taken into view, before your Lordships can properly determine whether the children of such a marriage are legitimate or not.

It will be very obvious to your Lordships, that, if such questions as these are to be taken into consideration, and argued upon the general principles of justice and expediency, this must become a very wide and extensive question; for there is no end to the speculations and opinions of men on general abstract grounds of justice, and on questions of expediency.

In so far as the principles of justice and of expediency can be taken into view in this case, I will submit to your Lordships, that both of them are clearly in favour of my client; but, at the same time, I must maintain, that the grand view of this question results altogether into a question of law, that it is not even a question of justice, and that it is far less a question of expediency.

Referring to the genius of the law of Scotland, in so far as it gives effect to the contracts and the conduct of parties, when they do any thing *in bona fide*, it is perfectly obvious, that the question now at issue is one which must be determined in favour of my clients. If a man sees another in possession of a field, and purchases it from him, believing that he is the rightful owner, and sows it, and employs his servants upon it, and lays out his money on the faith of his purchase, the law of Scotland says, that he shall reap the crop, and enjoy the benefit of his labour and expence, whoever may be the owner of it, and although his right may at bottom be good for nothing. Does not the same principle pervade all *bona fide* contracts, and will it not apply to such a question as the present? Even the law of

England, which has as little connection with this question as any law in the whole world, tells us, that, when a woman who is already married, thinks proper to marry another man, she is to be considered as his servant during the time that she lives with him, and that he is entitled to the benefit and produce of her labour. This just shews the extensive nature of the principles of *bona fides*, when they are received even in this view in England, however extraordinary the law of England may appear to us in other respects. A man is always entitled to his crop which he sowed, even when it turns out that the field which he bought belongs to another person, and not to the seller of it. There is no doubt that *bona fides* in the general case, will give the fruits to the person who *bona fide* raises them.

Apply these principles to the present case, and they will be found to accord most exactly with the plea which is maintained on our side of the bar. A man and a woman enter into the married state, with the presumed intention, and with the real intention, of having lawful children. What ought to be the effect of such a contract on the common principles of *bona fides?* Clearly, that the children will be their legitimate children, and that they shall be an honour and a comfort to them, and not that their very existence shall be a disgrace and punishment to them, by their being bastards.

These are the general principles pleadable in every case of *bona fides*, even in questions with the real owner. But if your Lordships will allow me to make an allusion, which may appear somewhat ridiculous, we are not at present in a question with the real owner. The alleged first husband is not here,—he is not making any claim for the child. It might be a very odd question between the two gentlemen as to which of them had the best title to this child; but what title has this third party, who has entered his appearance as pursuer in this case, to say any thing to the child,

or to make any claim to him? It humbly appears to me to be perfectly clear, that no third party has any earthly claim upon the child, or any right to challenge his *status* on any pretence.

This is all that I shall say on this view of the case.

Now, with regard to what I take to be altogether an assumption on the part of the pursuer, that this question is quite new in the law of Scotland, and that we are now endeavouring to introduce it for the first time; it appears to me to be totally unwarranted, to lay down any such proposition; or to draw the conclusions which he does against the validity of the defence.

From what we see as to the authorities which have been produced upon the subject, I think I may fairly assume, that, in case any thing of this kind had happened in this country heretofore, at least it would have been held as affording a *probabilis causa litigandi*. It would surely have been a probable case in favour of any parent who was maintaining the legitimacy of his child. It is impossible to believe, after what we have seen, that the claim could have been dropped at any time within these 500 years, without trying it at least. I think, therefore, that the dreadful colours in which our argument was painted, and the terrible consequences which the pursuer has endeavoured to draw from it must be far more imaginary than real; for, during that long period, the law has always been supposed to have been such as I am now maintaining, and we must have seen the effects of it before now, if there were in reality any bad consequences to be apprehended from it; and, therefore, if your Lordships will sustain these old and established principles of the law, and find it to be what we say it is, I really conceive there can be no reasonable grounds which can prevent your Lordships from giving effect to it now. The example of the last 500 years, is a proof that no harm can reasonably be apprehended from your doing so.

But the question of expediency goes farther than this. Your Lordships will consider what would be the consequence if you were to reverse the matter, and to determine it against my client. I can very well conceive that the worst consequences might arise. Your Lordships will be pleased, on this view, to compare the two laws together. When a public marriage is entered into, it is known over all the island. It is always very difficult to conceal it for any length of time, from the extreme publicity of the forms of marriage. Therefore, there is no great risk of such things happening often. At the same time there is a considerable check to any thing of the kind, and what the law has thought to be a sufficient check, in the laws against bigamy. That law is not obsolete; some of our laws are so, but that is not; and it is of itself a sufficient check against the dangers which the gentlemen on the other side have so liberally and eloquently ascribed to our view of this case.

But, on the other hand, if, after every thing that can give validity to marriage, all this is to be set aside, by means of an alleged previous clandestine connection, I pray your Lordships to attend to the dreadful consequences that would necessarily ensue, under a system of law by which marriage is so very easily contracted as it is in this country. Your Lordships know, that, in the wildness of youth, many kinds of connections are formed between the sexes. My friend Mr Erskine sometimes tells a story of a man who was to be examined as a witness; and who, when he was asked the usual question, Whether he was a married man or not, said he could not tell, for he really did not know. And really my Lords it was the very best answer the man could give. In a country like this, where marriage is so easily contracted, I believe there are many men who would be extremely puzzled to answer that question. Such connections are very frequent; and it would be dangerous indeed

to the legal and honourable connections which are formed in society, if the argument of the pursuer were to prevail, and it were to be found by your Lordships, that the children of a second *bona fide* marriage are illegitimate. By means of these youthful and thoughtless connections, the children of the most honourable and apparently good marriages might be cut out of all their rights at any distance of time;—I say at any distance of time, for *jus sanguinis nunquam præscribitur*,—and when it might be impossible to disprove the assertion.

I need not insist upon this view of the case. It is one which is extremely obvious, and it must satisfy your Lordships, that our view of the law is by far the safest of the two. I have also shewn, from the argument of experience, that there is really no danger in it. We know the consequences of the law as it has been; but there is no saying what may be the consequences of the law now pleaded by the pursuer.

From these remarks, I submit, my Lords, that, on a general view of the case, both the justice and expediency of the law are with me, and that the arguments of my clients are much safer than those of the pursuer. But after all that can be said upon views of expediency, that is not the question now before your Lordships. The question is, What is the law of Scotland? If there has yet been no express and specific declaration of the law on the subject, but what is to be found in first principles, then I maintain, that your Lordships must give the same effect to the *bona fides* of my client, that you would give to every other case of *bona fides* in other respects. But, in truth, this is no new law; it is not a law of yesterday; it is not a law of the Canonists; it is not a law of Craig; but it is the universal law of Scotland, and one which has been approved of by the wisest and the ablest men that ever sat on the Bench in Scotland.

My friends on the other side of the Bar bestowed much ridicule on the Canon law in general, but I do not remember that they ventured to say any thing very derogatory to the character of Innocent III., by whom this particular branch of the Canon law appears to have been introduced. They made some jokes about his infallibility, but they did not say any thing that could affect his character. Your Lordships, however, can estimate all this very properly. You have heard, from the best authority, what sort of man he was, and it is not for me to add any thing to what Mr Thomson said in his praise.

It appears clearly that this very question had agitated the opinions of the lawyers before his time. It appears that there had been different and contradictory opinions about it; and it appears to me that they treated it particularly as a case of Canon law. Yet it may be held to be a question of the Civil as much as of the Canon law, for it is as consonant with the principles of the one as of the other. But whatever it was, it was decided in favour of the argument now maintained by my client.

Mr Thomson stated to your Lordships, that this decision of Innocent III. had been universally approved of by all the Canonists. He said that he could have covered your Lordships' table with a hundred authorities upon the subject; and this statement was not contradicted, and could not be contradicted, by my friend Mr Gillies. He did not produce one single text to shew that there was any doubt among the commentators upon the subject; and, therefore, your Lordships must hold that they are, as Mr Thomson informed you, quite unanimous upon this point. And what did my learned friend say against this? He only said, that there were forty volumes in folio of one treatise on the Canon law, and nearly as many of another, and that they always contradicted each other. If they had

contradicted each other upon this point, he would not have failed to lay them before your Lordships. My friend said he had gone down to the Library *one forenoon* to learn the Canon law, and examine these voluminous works. This might suggest some ludicrous associations; but, at any rate, I am sure that a gentleman who learns the Canon law in the course of a single forenoon, is not entitled to abuse it.

But, my Lords, the very attempt to ridicule the Canon law, is the best proof of what it is on this subject. If it had been in their favour, the gentlemen on the other side would not have thought it necessary to say any thing against it. On the contrary, they would have treated it with that respect which they now profess to shew to the law of England, which, they seem entirely to forget, is no more to be studied and acquired in a single morning, than the Canon law. They affect to know nothing at all of the Canon law, but they pretend to have much knowledge in the law of England; and they venture to maintain, that the law of England ought to decide a question of this kind, though they know perfectly, that there are no two laws so different from each other, as the law of England and the law of Scotland, in matters of marriage or legitimation.

My Lords, this is a practice which is becoming much too common. Every man who has nothing to say for himself, either on the principles or authorities of our own law, has immediate recourse to the law of England; and nothing is more easy than for a man who is not acquainted with that law, to prove any thing he pleases from it. This practice ought to be discountenanced. I have heard Lord President Blair say, that he never had learned, and never would learn, the law of England. For my own part, I know nothing of the law of England; I do not believe I ever will; and I have hardly ever looked into any other book upon it but Blackstone; and I do not believe that my learned friends know much more about it. I think there is some slight obliga-

tion upon us to know something of the Canon law; for, let gentlemen say what they will, it is, in some points, one of the sources of the law of Scotland. But there is no such call upon us to study the law of England; it is of no use whatever in our own peculiar system; but clearly, the study of the Canon law must throw light on many points of our own.

We are told the Canon law can be of no consequence, because we have no professors of it; they never thought of teaching it in our schools. This is a very powerful argument! Why, my Lords, it is but very lately that we had no professors, even of Scotch law. There are to this day many branches of our own common law, of much more value than the Canon law, of which we have no professors. We have no professor of the law of Insurance. We have no professor of the laws relating to Bankruptcy. We have no professor of Criminal Law, and never had, excepting during one summer that Mr Hume was kind enough to give a set of lectures on the subject. Do my friends mean to say, that we have no insurance, or bankrupt, or criminal law, because we have no professors of those laws; or that we had nothing but Civil Law in this country, till a professor of Scotch Law was appointed? This really is a very odd argument; and it just shews how much the gentlemen feel themselves pressed by the Canon law.

The Canon law, with all its faults, and whether it has been sufficiently studied by our lawyers or not, is unquestionably the root of many important parts of our system. It was stated by Mr Thomson, that, in the old consistorial court,—the court in which the validity of marriages, and the legitimacy of children, were tried,—the Canon law was administered before the Reformation. And in what manner is it to be presumed that they administered it? Just, my Lords, in the way in which it appeared in the books of

the Canon law. If they did not, it is certainly incumbent on the pursuers to shew it, which they have not endeavoured to do; and, therefore, there seems to me to be good ground for saying, that the consistorial courts of this country held that the opinion of Innocent III. was right; for it was held to be good law in all other countries governed by the Canon law, and we have no evidence of the contrary having been the case here. It is true, that, to a certain extent, the Canon law was abolished at the Reformation; but your Lordships will consider what the judges of the consistorial courts were doing in the mean time. What had they been doing during the long period between the time when it was first established and the time of the Reformation? This must have been held to be law then,—we have evidence that it was held to be law; and since the Reformation there is no proof that it has been altered, notwithstanding all that has been said by the gentlemen on the other side. Nobody ever opened a book on the law of Scotland, without seeing that the Canon law is used in, and forms a branch of, our law. In so far as it was received and acted upon before the Reformation, it is a branch of the law of Scotland. There is no matter why or how it was brought in; it is a part of our law; and we are not to look so much to the sources or the causes of it, as to the existence of the law itself.

The present question is, Whether our law sustains the legitimacy of the children, on account of the *bona fides* of one of the parents. We see what the Canon law is. We see that the Canon law was administered in our courts for centuries after the question was held to be fixed among the Canonists; and we see no case in which it is pretended that the matter ever was determined differently either by ourselves or in any other country in which the Canon law was

at all admitted. We see no reason to doubt that this would have been the determination of our courts. They could not, consistently with their customs, have determined it in any other way. If they could, my learned friends would not have failed to inform us of it; and I submit it to be perfectly clear, that the *prima facie* presumption is in favour of my client, altogether independent of the opinions of any of the writers on our own law.

While I maintain this argument, however, from the Canon law, I cannot admit the statement of the pursuers to pass unnoticed, that my plea is altogether founded upon that law. It is not founded on the Canon law. It is founded on the law of Scotland. To shew what the law of Scotland is, I may shew the sources of it. I may shew from what authority any particular point has been adopted into the law of Scotland. But that is no sufficient ground for saying, that I am maintaining so strange a doctrine as that the Canon law is the law of Scotland. I am only shewing what the law of Scotland is, when I refer to the Canon law. I am only stating what must have been the law of Scotland before the Reformation.

If this was the state of our law before the Reformation, your Lordships will next consider whether any thing has been done to alter it since that time.

The oldest authority which we have upon this, or perhaps upon any point in the law of Scotland, is the *Regiam Majestatem;* and I am very much mistaken, if the *Regiam*, when fully considered, and taken along with the note of Skene, read by Mr Thomson, does not establish, that, at the time when it was compiled, where any marriage was dissolved, on account of an unforeseen impediment, the *bona fides* of one of the parents was sufficient to secure the *status* of legitimacy to the children.

I apprehend that your Lordships were not much moved

with what was stated on the other side, as to the authenticity of the *Regiam Majestatem*, or as to the many texts which it contains, that are not now the law of Scotland. As to its authenticity, or its antiquity, it is really of no consequence on this question. Your Lordships know that it was long prior to the Reformation, and that it has long been held to state the law of Scotland. It is quite true that there are many texts in the *Regiam* which we do not hold to be law now. But that is no evidence whatever that the whole of it was not at one time law in Scotland. We are taught by our old writers that it was the law; and if some parts of it are not law now, we know very well when and in what manner they ceased to be so. The presumption therefore is, that, at one time or other, every text in the *Regiam Majestatem* was agreeable to the law of Scotland. If your Lordships do not hold this to be the fact, there is not one law-book that ever was written that is of the smallest authority; for there is not one work in any law that is at this day quite correct in all its parts,—there is not one perhaps which is not altered in some way or other very soon after it is published; and, as an example, I may mention the very latest of our works, Mr Hume's book on Crimes. Does any body doubt that it is a book of very high authority, and yet does not every body know that various matters which he treats of have been differently decided since it was published? It is a necessary consequence of the improvement of the country, and of the alterations in men's views, that there should be such changes. Some people may think that our law has been improved,—some people may think that it has been injured, by these alterations; but there is no doubt of the fact that it has been altered, and that it is altering daily.

With submission, therefore, my Lords, the gentlemen do not do enough when they shew me a few texts in the

Regiam which are not the law of Scotland now, but which may have been so, and which I believe to have been so, formerly. I might return the compliment to my friends, and shew them many passages in Stair and Erskine which are not the law of Scotland now; and I am sure, my Lords, it is too much to expect, that the *Regiam Majestatem* should have stood an ordeal in which both of these authors have failed.

How is this to be applied? I produce this work, which I admit has been so much changed, as an authority in my favour. I apprehend, my Lords, that it is an authority still, in so far as it has not been changed. I can shew how and when many parts of it were changed; but I am entitled to hold, that every part of it continues to be law, which the other party does not prove to me to have been changed.

What does the *Regiam* say *? "Idem dico, si fuerit ab eo "separata propter parentelam. Et tamen liberi ejus pos- "sunt esse hæredes, et de jure regni patri succedent, jure "hæreditario." This passage was read to your Lordships, and what was the objection which was made to it? The objection was, that the rule only applies to a dissolution of marriage *propter parentelam*, and not to any other case than that of too near relationship.

And first, my Lords, I must observe, that the reason of the law applies just as strongly to the case of my client as to the other. But I may go farther than that; I say that it applies more strongly, and that my case must be included in the other; for what does the law say? It says, that, if the marriage is dissolved on account of *too near* a relationship, (without any distinction as to degrees, for it includes a man's own mother), still the children are legitimate. Is there any room for *bona fides* there? Can it be supposed

* Lib. ii. chap. 16. sect. 74.

that parties standing in too near a relationship should not know each other?

Lord JUSTICE CLERK.—It is taken for granted that one of the parties is ignorant of it; but it is much more likely that a person in the situation of your client's father should be ignorant of a prior marriage, than that a man should not know he was marrying his own sister.

MR CLERK.—If there is *bona fides* there, and it is very difficult to suppose that there should, and if it is in that case to have such a powerful effect, what plea of justice or consistency can be urged for denying effect to it in the case of persons situated like my client? I apprehend, my Lords, that the plea is much more strong in my favour than it can possibly be in the case which is put in the *Regiam Majestatem*.

But here I must mention a fact of some curiosity and importance in this case. Your Lordships know that there are many old manuscripts of the *Regiam Majestatem*, both in Latin and in English; and I have here an old manuscript translation, apparently of the time of James IV., the authenticity of which is quite unquestionable, and I shall read it to the Court. (MR CLERK read a passage, which is a pretty close translation of Skene, with the difference that it mentions *other causes* of separation to this effect; "but if she be separated from her husband, because "of parentage, kindred, *or other lawful cause*, nevertheless, her bairns may be heirs, and through the law of "kindred, they will succeed to the heritage.")

Now, this is not agreeable to Skene's edition. He collated many copies together, and made up his edition according to his own notions of what the law ought to be.

But here is a manuscript translation made a century before the time of Skene, and it states the case generally as to dissolution on account of kindred, or *any other lawful cause*. The only question here is for your Lordships to consider, whether you will give credit to this copy of the *Regiam?* I do not say that you ought to take it in preference to other authentic copies, but I am sure that at worst it is a very good adminicle in favour of my client. The words, "*or other lawful cause*," are no doubt written on the margin of this manuscript, but they are written in the same hand, with the same ink, and at the same time with the text. I hear the gentlemen whispering that it is therefore false or interpolated. But, my Lords, I conceive that my case is so much the stronger from that circumstance. It is an opinion of a lawyer of that day, that what I am now pleading was then the law of the country.

Lord JUSTICE-CLERK.—Whose manuscript is that?

Mr THOMSON.—We do not know whose manuscript it is, but we know that it has been in the Advocates' Library more than a century.

Mr CLERK.—Your Lordships will also recollect, from the annotation of Skene on this very passage, that his opinion was the same as that of the writer of this manuscript. But my learned friends took no notice of his opinion. It was wise in them not to do so, and your Lordships know well, that, when these gentlemen omit any thing, they have extremely good reasons for the omission. I will read it again to your Lordships *. He says, "Hunc locum resti-"tui, veterum codicum fidem, et jus canonicum sequutus. "Parentelam autem intelligo vel consanguinitatem, vel

* Reg. Maj. L. ii. cap. 16. sect. 74. note.

" affinitatem, propter quas infra certos gradus de jure pon-
" tificio dissolvitur matrimonium, nisi Papæ dispensatio in-
" tervenerit. Mulier itaque propter parentelam a viro se-
" parata, nullam dotem petere poterit; tamen liberi ex eo
" matrimonio procreati, etiam ante sententiam dissoluti
" matrimonii, legitimi sunt, et jus successionis obtinent:
" quia eorum causa est favorabilis. Ideoque cum de eorum
" conditione agitur, tempus non solum contracti matrimonii,
" sed etiam conceptionis inspicitur. Etenim liberi legiti-
" mantur, per nuptias contractas, videlicet bannis solem-
" niter inde editis, impedimento nullo comperto, et altero
" conjugum bonam fidem habente, tempore matrimonii
" inter eos contracti."

So, my Lords, we have the text of the *Regiam Majestatem*, the opinion of this Glossator, and the opinion of Skene, all in favour of the plea maintained by my client. I submit to your Lordships, that they furnish grounds for a fair conclusion in his favour. It is possible that these might not be very valuable opinions, if there was any thing to set against them, though I submit to your Lordships that they are. But have the gentlemen on the other side produced any one authority which they can pretend to set against these opinions? They have not. These authorities will be received by your Lordships as evidence of the ancient state of the law; and, considering that no case has ever been decided to a contrary effect, I submit that they are even a great authority to shew what the law now is. We have shewn your Lordships what the consistorial courts would most likely have done in such a case as this; that the Canon law was used by them for many centuries; and we have also shewn the opinion of various writers on the same side of the case.

The next authority which was quoted was that of Craig, and it appears to me that his authority stands very high in a case of this kind; and especially when we consider who followed him, and the manner in which he is

mentioned by them, his opinion is almost enough to determine the point of itself. And here we are saved from entering any farther into this branch of the case, for it is not now denied what his opinion really was, indeed it is expressly stated to have been his opinion by Stair, and Bankton, and Erskine; and it was decidedly that the plea which I am now maintaining to your Lordships was good.

And how is this opinion opposed? Not by any argument against its justice, but by an attack upon the credit and reputation of the writer. The gentlemen have nothing else to say. What could they say? It is quite clear that his opinion is what I have stated it to be. They cannot destroy it on the ground of its being contrary to equity or justice; and unless they can destroy it, they have no case here.

It would be wrong in me to detain your Lordships with saying much in favour of an author so respectable as Craig. Why should I support his character? It requires no support from me. Your Lordships know it well; and you will make the proper estimate of the attack which has been made upon it by my learned friends. The same thing is repeated against Craig, that was urged so strongly against the *Regiam Majestatem*. It is said, that there are many opinions in Craig which are not now the law of Scotland. That is quite true. But what inference can be drawn from it? It is quite plain that he knew all the feudal law which was known in his time. It also appears that he was acquainted with the whole law which was then practised in Scotland. But he had very imperfect materials to work upon, as our law was then far from being a complete system. Being a man of general learning, he was acquainted with many matters of foreign law, and, in various places of his book, he offered his opinion as to points which had not been settled in the law

of Scotland. And in what respect does it detract from the merit of his book, that some of these opinions have not been followed, or that some points which were law then, have since been altered? I may just take Mr Hume's Criminal Law as an example again. That part of our law is still in some respects imperfect; and Mr Hume has given us his own opinion on many matters which have not yet been decided by the Courts. My Lords, are we to be told that Mr Hume is ignorant of the criminal law of this country, or that his book is a system of foreign laws, because some of the points on which he has given opinions may have been decided differently since? No more, my Lords, can any thing that has been said by Craig derogate from his general character or credit as an accurate and learned lawyer.

One thing was said against Craig which I really did not expect. It was said, that his ideas were entirely sophisticated by his foreign education, and his foreign life. My Lords, Craig did not pass the greatest part of his life abroad, as my friends would insinuate. He was educated abroad, just as most of the young men of his time were; but he returned at the usual time, and passed his trials, and lived and practised at home like the rest; and he was no more apt to be sophisticated than the lawyers of our own time. Few of the lawyers, even of the last age, did not receive their education abroad.

The opinion of Craig is too clear to admit of any dispute. It is quite needless to inquire whether he in general preferred the Canon law or the Civil law, or whether he was right or wrong in his ideas on the law of England. He may have been inaccurate in his expressions, though it does not appear to me that any inaccuracy has been proved against him: But the question here is, as to his opinion on the law of Scotland. And upon that matter I

submit, that he is a great and weighty authority in my favour.

We have also a dispute as to a passage in his book, upon which the gentlemen would put a very singular interpretation. He was accused of the gross absurdity of alleging, that both the Civil and the Canon law have been adopted as the law of Scotland; and if I did not misunderstand the gentlemen, the imputation went the length of saying, that he was for adopting the whole body of both, though in many points they contradict each other. I submit, my Lords, that the passage is abundantly clear; "Hæc sunt "quæ de bastardis tam jure Civili quam Canonico, quo "hodie utimur, præscribuntur." It is impossible to misunderstand the meaning of this passage. It is quite clear that he meant "those parts of the Civil and Canon law "which are used and observed by us." And this explanation differs very little from the one which was given by my friend Mr Thomson, who seemed to be for applying it most strongly to the last mentioned or Canon law; but it is of no consequence whether he meant to apply it to both, or only to the last.

The next authority we have, is that of Lord Stair. He repeats the opinion of Craig with the respect which he usually shews for that writer's opinions, and he does not appear to have been of a contrary opinion himself. He does not even express any doubt upon the point. The utmost, therefore, that, in fair reasoning, can be said on the other side is, that it does not appear that he had so considered the matter on general principles, as to be able to say for himself, whether the opinion of Craig was a sound opinion or not. That is the very utmost that can be drawn from the way in which he expresses himself.

Now, my Lords, I say that the same thing occurs in every book of the kind. A man writing a book of so ge-

neral a nature as the Institutes of the law of a country, neither can enter, nor pretend to enter, into a minute investigation of every point which occurs. For the most part, he contents himself with stating the authority which he refers to, without saying whether, in his own private opinion, the judgment was right or wrong; and it must be presumed, that he approves of the opinion which he repeats, unless he says expressly that he does not. Stair gives the authority of Craig, as one on which he relies; if he had not meant to do that, he would have expressed some doubt about it. It is not necessary for me to maintain, that Craig is as good an authority as a decision of this Court, but still he is an authority in my favour, and he is one on whom Lord Stair relied.

Having made these observation on the passage in which Stair takes notice of the opinions of Craig and the Canonists, the very same remarks apply to the manner in which the same opinions are noticed by Erskine and Bankton. It is said by the pursuers, that they all mention it with caution, but I really cannot see, in all their writings, any criterion which can entitle the gentlemen to say whether they were cautious or incautious, in the mode of treating the subject.

And now, my Lords, What is the amount of the authorities which I have laid before you, in support of the pretensions of my client? You have *first* the Canon law. *2dly*, The undoubted use of the Canon law in our consistorial courts; *3dly*, The *Regiam Majestatem*; *4thly*, The opinion of Skene; *5thly*, The opinion of the glossator; *6thly*, That of Craig; and, *7thly*, Those of Stair, Bankton, and Erskine;—all of them noticing the opinion which I am now pleading to your Lordships, some of them with approbation, and all of them without the least expression of doubt or dissatisfaction. I submit to your Lordships, that

these of themselves are enough to ascertain the law in such a case. Surely against so many authorities as these, it should be necessary to point out very strong reasons indeed, in justice or in expediency, to induce your Lordships to give a contrary decision.

This is a question which has not yet been decided, however, by our courts of law; and, therefore, your Lordships cannot be regulated by the opinions of your predecessors, unless you consider the opinions which were given in the case of Campbell of Carrick as being to the point.

But what can your Lordships have in such a case, but the opinions of writers handed down from age to age, without any doubt being thrown upon them? What stronger authority can be wished for than that? If it were contrary to all justice, equity, utility or expediency, it would even be a strong thing to go back upon a law so authenticated. But in this case, nothing whatever has been alleged to induce your Lordships to go back upon and reverse the opinions of all your predecessors; and therefore, my Lords, nothing remains for you to do, but to adopt them. An ancient opinion is presumed to have been given on good grounds. What more can your Lordships have than such presumptions? There is no room to inquire into the fact. We must take it on the credit and character of the men who have given the opinion. We cannot presume that they would have given an opinion contrary to law; and, if they were capable of doing so, we cannot hold that the other writers who followed them, would have allowed such an opinion to pass without examination.

If, then, there is such a presumption in favour of ancient opinions, the next point to enquire into is, Has any thing been done, in contradiction of those opinions on this subject? And here your Lordships will observe, that the principles of the law of Scotland do not permit any law to go into desue-

tude, without a contrary usage. A statute, it has been said, may go into desuetude, and we have too many examples of the fact, to permit me to dispute it; but no statute goes into desuetude without a contrary usage. In the same manner, my Lords, an opinion, sanctioned by the authority of all our ancient writers, and handed from age to age by one author to another, cannot go into desuetude without a contrary usage; and, therefore, my Lords, I apprehend that it is incumbent upon the pursuer to shew that something has been done, either by the Legislature or by the decisions of our Courts of law, contrary to the ancient opinions, before he can be entitled to expect your Lordships to reverse them.

But there is a great deal more here than an opinion: there is a voucher for the opinion. What Craig says as to himself, is an opinion merely, no doubt; but he gives the reason of the opinion which he entertained, and he shews, beyond all doubt, that it was founded upon good grounds. We find, that it was part of the Canon law, in which we plainly see the source of the opinion given by Craig. We have every authority that could possibly be obtained in such a case. What other authority could we have? There has been no decision of our own Courts upon the subject. Can we create a case for an authority?

In this view of the case, the opinion of Sir Samuel Romilly must be of very little weight with your Lordships. He saw no decision on the point. His opinion may be, and it is, a great authority as to the law of England, but it can have very little value in the determination of a question of Scotch law.

It is impossible that we could have brought forward any other authority to your Lordships than we have brought.

Lord MEADOWBANK.—I would like to know how many cases may have been privately settled and determined on those very authorities.

Lord JUSTICE-CLERK.—It is in favour of Mr Clerk's argument, that the case has never been tried. I am surprised that Sir Samuel Romilly, when he was asked to point out any authorities upon the subject, did not take some notice of the distinction between null and voidable marriages, for it is clear, that the English admit the legitimacy of the children in marriages which they call only voidable.

Mr CLERK.—It is not incumbent on me to account for the fact, that no case has ever been tried on this point of law in our country; but I submit it to your Lordships as a very good ground for believing, that the mischiefs which the other party seem to apprehend from my doctrine, have no real foundation.

Lord JUSTICE-CLERK.—It is a case which will not happen once in five hundred years.

Mr CLERK.—I will not pretend to say, whether the reasons which I have now employed, prevailed with the Court in the case of Campbell of Carrick; probably much better reasons were used; and it is just as probable that no reasoning was employed at all, and that none was necessary. But what the opinion of the Court at that time was, appears by several authentic and irrefragable documents.

Not only were the Judges of that time all of one opinion, but it was admitted on both sides of the Bar, that the child of the second marriage must be legitimate. Mrs Campbell's counsel argued upon it as an indisputable fact,

and it was not denied on the other side of the Bar, that the child was entitled to the *status* of legitimacy, notwithstanding the prior marriage. If I am asked, How does this appear? I answer, that it appears from Falconer's report of the case; in which it is said, "Such of "the Lords as were for the interlocutor reclaimed against, "declared, that whatever was the issue of this question, "the daughter would be legitimate from the mother's *bona* "*fides*." What is the meaning of this passage? It is,—though the previous marriage were proved, even we the minority of the Court, who are for permitting it to be proved, are of opinion that the children of the second marriage must be legitimate.

This fact, by no means, rests on the authority of Falconer's report of the decision, for your Lordships have already heard an authority which is entitled to the greatest weight, and which was not noticed by my friend Mr Gillies; I suppose he found it too hard a morsel. Lord Elchies says, "*We all agreed* that Mrs Campbell having, "without challenge, lived 20 years with Carrick as man "and wife, and even owned as such by Mrs Kennedy, "that Mrs Campbell has all the civil rights of a lawful "wife, and her children, of lawful children."

Who were the Judges who sat upon the Bench at that time? Among other eminent men, my Lords, there were Arniston, President Forbes, and Elchies. I think the two first were right in wishing to allow a proof, though they failed in getting that object accomplished. And yet even they concurred in the opinion of the Court, that the child was entitled to be considered as a lawful child. They made no distinction as to the *bona fides* of the one parent, and the *mala fides* of the other. They held it to be a lawful child to both the parents, in respect of the *bona fides* of one of them. Lord Elchies himself was quite clear, that

the real question before them, was the personal objection against Mrs Cochrane being allowed to prove her marriage at all, and that it was a good objection. A different opinion was entertained in the House of Lords, and the judgment was reversed. But it was ultimately decided against Mrs Cochrane for want of proof. That was no case of legitimacy to be sure. It was a question of marriage, but I am in the judgment of your Lordships, if that can be held as a mere *obiter* opinion; when it is clear, that it was a point which it was absolutely necessary to consider, and which was completely interwoven with the merits of the case then at issue.

Lord GLENLEE.—I have a manuscript * collection, which may possibly be by Lord Tinnwald, but I am not sure if that report makes the legitimacy of the child, which was reckoned quite undoubted, the foundation of the opinion of the Court on the case then before them.

Mr CLERK.—I am now going to read a most material document indeed, though it is only a statement of one of the lawyers in that case: it is a passage in the Replies for Mrs Campbell, and from it we find what she held, and what was admitted on the other side of the Bar, as undoubted law.

It is there stated: "The defender shall add but one farther consideration upon the general point. She has children by the Captain, born, as she believed, and as all the world believed, in lawful wedlock. The pursuer herself

* The collection of Lord Glenlee, appeared to be a copy from that of Lord Elchies, and the passage which his Lordship read was in these words, after stating the facts of the case: "Yet since both marriages were "now dissolved, and the pursuer's marriage could have no civil effect "against the second wife and her children; the Lords would not allow the "first a proof of her marriage."

" is forced to acknowledge that no *quæstio status* can be " moved against them, and that they must be entitled to all " the legal benefits, as being the Captain's lawfully begotten " children. Their mother's *bona fides* operates this effect, " supposing their father to have been guilty of the crime " which the pursuer lays to his charge, (which, at the same " time, is far from being admitted). If her *bona fides* can " have this effect with regard to the children, the pursuer " is challenged to assign a reason why it should not have the " same effect with regard to herself. It may be supposed " that her *bona fides* would not be sufficient to make her " marriage legal, if a former marriage should be proved, nor " entitle her to possess the Captain, as her husband, were " he alive; but when the question is only of the wife's legal " provisions, it appears extremely clear, that a woman who " has relinquished her husband, and allowed him not only " to marry again, but to cohabit with another woman as his " wife for years, can never claim these legal provisions in " competition with the other, whose *bona fides* must secure " her, and entitle her to all the legal consequences of an " honest marriage; and if her *bona fides* secure her children " as to their privileges, it must equally secure herself as to " hers."

It is quite impossible, therefore, my Lords, to entertain the least doubt as to the fact that this was the general opinion of the period, when that case of Campbell and Cochrane was tried. The grounds of the interlocutor, in that case, were thought, by the House of Lords, to be untenable, in so far as it refused the first wife a proof of her marriage. It was reversed of consent. The proof was taken. It turned out against Mrs Cochrane, who failed in making out her marriage; and that judgment was affirmed on a second appeal to the House of Lords.

There is a passage in the interlocutor of the Commissaries, in that second part of the proceedings, which was not altered either by the Court of Session or the House of Lords, in which they mention the cohabitation of Carrick and his second wife in a particular manner. They "found Mrs Jean "Campbell's overt cohabitation with Carrick from the be-"ginning of 1726 to 1743, as man and wife, proven;" and why so? There was no occasion to consider this particularly; any kind of proof of a marriage is sufficient. There was no necessity, in that point of view, for adverting to the proof of overt cohabitation: yet this is specified in the interlocutor of the Commissaries as a material circumstance; and it shews your Lordships, that the *bona fides* of Mrs Campbell was thought to be material, and that the Commissaries, the Court of Session, and the House of Lords, all considered the *bona fides* of Mrs Campbell as forming a material ingredient in the case.

Then what is the amount, my Lords, of the authority of this case of Campbell? My learned friends said that it is just no authority at all. It appears to me in a very different point of view. It is a record of the unanimous opinion of a most learned Court, and I think, I may almost say, of the Bar and of the public, but, at all events, of the Court,—that the *bona fides* of one of the parents was enough to ensure the *status* of legitimacy to the children. So far from being no authority, it appears to me to be a better authority than all the others put together. The other authorities give decided opinions of individuals in my favour no doubt; but here your Lordships have the unanimous opinion of the Court of Session. What would they have done if the present question had came before them? Can there be the least doubt that they would have decided it in favour of the plea which I am now maintaining. The authority of a decision of this Court goes no farther than to shew, what was the

opinion of the Judges who pronounced it; and it was the opinion of them all that it was the law of their time. And this is all the authority which your Lordships can ever have in any case where there is not an express act of Parliament.

I am entitled, therefore, to assume, that the argument which I am maintaining was the law of that day; and I wish to know what has altered it since. I know nothing of that kind myself. I know of no such change in the circumstances of the times, or of the law of Scotland, as to make that which was law then not law now; and in this view of the matter, my Lords, I conceive that I have proved my case to be the law of the country, on the very best and highest authority.

Various objections have been started on the other side of the Bar, of which I shall now endeavour, as shortly as I can, to take notice.

It has been suggested, that, in certain cases, men already married might go to distant parts of the country, change their names, and marry new wives, expressly because the *bona fides* of the mother would legitimate the children; or that, even without marrying, a man might go and get bastard children all over the country, and thereafter endeavour to legitimate them by this sort of *bona fide* marriage.

I need not say much in answer to such an argument as this. There is one general remark that applies to all arguments of the kind,—that general laws are not made for extraordinary frauds. They are made for the purpose of assisting that state of society to which they are applied, and particular laws are made for particular crimes. This country is not composed altogether of knaves and villains. I hope we have yet some good principles among us. Our law is not calculated (nor was it intended to be so), for a nation of arrant knaves. It does not attend to extreme

cases. It is meant for those cases which most commonly occur. Neither is it meant for a nation entirely innocent. Such a set of men would need no laws. It is framed on the supposition of a sort of mean or middle state, in which some men may commit crimes, but in which all men will not. The law is applicable to this middle state, and not to either of the extreme cases. It is quite enough if the law is fitted for the people such as they are; and I humbly submit to your Lordships, that that law which has been attended with no mischief hitherto, is well calculated for its object.

Law is intended for the protection of the innocent, and the punishment of the guilty. Does our law not punish the guilty when it finds any person guilty of the crime of a second marriage, pending the subsistence of a first? Is there not a specific punishment for the crime of biganiy? That punishment has been held by our lawgivers and our judges hitherto, to be sufficient for its purpose; if it had not, it would have been altered, and I submit, my Lord, that it amply serves both the purposes of law, that of punishing the guilty on the one hand, and protecting the innocent on the other.

Your Lordships also heard a great deal about the absurdities of the Canon law; and the pursuers made many an attempt to pull down what we never attempted to rear up, and in so far they set themselves to a very unnecessary task. But, on the other hand, my Lords, you heard a great deal about the law of England, and the wonderful equity and propriety of that law. For my part, when I heard that part of the gentlemen's argument, I could have believed myself to be in Westminster Hall. They were not at the trouble of proving their assertions on that head, but laid them down as quite clear and unquestionable; and my friend Mr Gillies went so far as to say, that the distinction

between null and void, and voidable, was a fact, and that that was enough for him.

But, my Lords, the question is not as to any fact in the law of England, but as to the law of Scotland. And here I beg leave to observe, that it would have been quite impossible to refer to any system of law more completely different from our own, than the law of England has always been in matters of marriage and legitimation. What is the law of England in such matters, and what is its connexion with the law of Scotland? In our law, we have marriage by promise *cum copula*, by declaration, by habite and repute, in short, by every method from which consent *de præsenti* can be inferred. In England they have no marriage but by regular celebration. In matters of divorce, again, our divorce is absolute in every respect, and the parties are as free as if they had never been married. How different is that from the law of England? I need not enlarge upon this subject. They have only a separation *a mensa et thoro*. There is not a single principle in the law of England that can possibly apply to ours; the two systems are so completely different from each other.

In this view of the case, it appears to me, that the production of Sir Samuel Romilly's opinion to this Court, is just one of the most extravagant things that ever was attempted, as if he was to overturn the law of Scotland, of which he cannot be presumed to know any thing at all, by his opinion on a law so completely different.

I do not mean to say, that the law of England may not be referred to in many cases with advantage, such as cases of insurance, bills of exchange, or in the construction of general statutes; but to refer to it on a question of marriage or legitimation, seems to me to be utterly extravagant. What would the lawyers or judges of Westminster Hall say to any thing of this kind? How would they receive an

opinion of a Scotch lawyer, produced to them in a question of English law? There are cases where they will receive both Scotch and Irish authorities, when the law happens to be the same with their own; but was such a thing ever heard of, as their receiving them in cases where the laws are different?

Your Lordships were also entertained with a long argument on the great authority of the Canon law in England. In the *first* place, it was said by my friend Mr Gillies, that the Canon law was of no authority here, and that he had not been able to discover any one point of our own law, which had been drawn from the Canon law.

Mr Gillies.—I did not mean to say that.

Lord Meadowbank.—I suspect that legitimation *per subsequens matrimonium*, was stated by Mr Gillies as an instance that nothing was derived from that law.

Mr Gillies.—I only said that that point was not so derived.

Mr Clerk.—It was attempted, at any rate, to be made out, by means of a long detail, that the Canon law was of more authority in England than in Scotland. Then, the argument was, that, if the Canon Law is of more authority there than it is here, and if, according to the law of England, as explained to us in the opinion of Sir Samuel Romilly, there is no such thing as legitimacy on account of the *bona fides* of one of the parents, we cannot have any such principle with us. Great pains were taken to make out this syllogism; but, I think, I never heard a more obvious fallacy. Suppose the whole *corpus Canonicum* had been introduced in England, excepting this particular part

of it, would that have proved that we did not admit this doctrine? We might have rejected every other point in the Canon law, and yet we might have received this one.

Another argument was maintained to this effect, that, even if Pope Innocent III. had had the deciding of this case, he would have decided it against my client, because, as the gentlemen chose to say, Mr —— and his wife were not married *in facie ecclesiæ*. Now, it is very true, that the ceremony between those parties would not have been a marriage *in facie ecclesiæ* in the opinion of the Canonists. I know that very well. No marriage was *in facie ecclesiæ* by that law, which was not celebrated in the presence of the whole Church, and, according to that argument, we never can have the benefit of legitimation from *bona fides*, because we never have any such marriages.

But your Lordships cannot entertain this argument. What the law must apply to, is a real public *bona fide* marriage in our sense of the term. Even if this were not a public marriage, I would maintain, that a *bona fide* marriage of any kind was just as good for my argument as a marriage *in facie ecclesiæ*. But it happens that this marriage was *in facie ecclesiæ*. They were married by a regular clergyman, and after the publication of banns; and, therefore, I am much mistaken if Innocent III. would have decided the case against us, for I am sure he would have decided according to the law of the country.

But while I am upon this head, I must add, that I think Mr Gillies should have recollected, that he was not entitled to maintain, in the very same breath, that the first marriage was a public one, and the marriage with my client a private one. The marriage of my client was a public, legal marriage, perfomed by a clergyman, and preceded by proclamation of banns. The only ground that they have for objecting to it is, that the mother of the

lady was not present at it. Really, my Lords, I never heard of that being an objection to a marriage. I never heard that the mother must of necessity be present to stamp it with the character of publicity.

In the end of his argument, Mr Gillies stated the terms of the Royal Marriage Act; and the inference he drew from it was a notable one. That act was made for the prohibiting of marriages in certain cases; and it declares, that any marriage in the prohibited situations, shall be void and null. There is nothing said in the act as to whether the children of such marriages shall be legitimate or illegitimate; from which it was assumed, that it was the opinion of the British Legislature that no such children could be legitimate. Then he put the case of a member of the Royal Family already married coming down to Scotland, (or not married, for the act would equally apply), and marrying a woman *bona fide* ignorant of the former marriage, or of who she was marrying; and he asked your Lordships what you would do in such a case?

I submit, my Lords, that this case is not worthy of your notice. It is a very likely thing to be sure, that one of the Royal Family should come down here, and so disguise himself as to produce any real *bona fides*. Your Lordships will decide the case, if there is any difficulty in it, when it occurs. But, what is the authority of the act of Parliament? It does not revoke any one article of the law of Scotland. An act of Parliament does not repeal the laws of any country by implication, and still less by means of an expression of a mere opinion of the Legislature, and that not directly spoken out, but only inferred by implication. But, if your Lordships look to the act, you will see that no such opinion is implied. Quite the reverse. The argument is groundless and futile in its very foundation. The act does not merely say that the marriage shall be void and

null, but that it shall be void and null to all intents and purposes whatsoever;—that is to say, that no *bona fides* shall sanction such a marriage, or give any effect to it; that must be the meaning of it, otherwise there is no meaning in the words at all. A thing may be void, and yet it may be attended with some effect, on account of the *bona fides* of the party; but where it is declared to be null and void to all intents and purposes whatsoever, it prevents any effects from arising from the *bona fides* of the innocent party. In the same way as your Lordships know the acts of Parliament as to game-debts and usurious transactions, render bills of exchange null and void, even in the hands of *bona fide* onerous indorsees; though, were it not for the terms of the acts, it is quite clear that *bona fides* would evade the challenge, even though the law should still subsist as to the principal parties themselves.

I remember another act of Parliament, which I may mention as affording a strong illustration upon this subject. It is the Scotch act 1600, c. 20., which declares, that any marriage between a party divorced for adultery, and the person on whose account she was divorced, shall be *null*, and the succession to be gotten by such unlawful conjunctions, to be incapable of succeeding as heirs to their parents. It does not stop short at the nullity of the marriage, but proceeds expressly to enact the disqualification. And yet our authors, and particularly Lord Stair *, have maintained, that the children of such *null* marriages are to all other effects legitimate children.

In the *last* place, with regard to the matter suggested to us from the Bench. Your Lordships have been informed, that the estate in this case comes from an uncle. He made

* B. iii. tit. 3. p. 444.

a will, by which he divided his estate equally among his children. And this lady, *proprio jure*, inherited one-half of the property. As to that half, your Lordships will remember that the first husband is not in the field. He is making no demand upon my clients. The pursuer may insist in his own right, but he cannot insist on what is the right of that gentleman. The deceased executed a settlement of her part of the estate, and the question is, If she, whether she was formerly married or not, effectually bound herself and her heirs as to that part of the estate? and I can see no argument capable of touching that part of my case. If she had no title to bind her estate, it was in respect of the claim of her first husband, and not of the claim of the pursuer. Therefore, as to it there can be no question.

As to the other part of the estate which belonged to her brother, he made up titles to it, and the Court has to consider how far he was *in bona fide* to do so. But it does not appear to me that that matter has much to do in the present stage of the cause; for still, whatever may come of the estate, yet, if it is made out that my client is not legitimate, the pursuer must be entitled to serve himself heir both to the lady and her brother.

19*th February* 1811.

Lord NEWTON.—I will not take up your Lordships' time with many words in giving my opinion. The case may appear to be a matter of difficulty to some persons, but I confess that I have formed a very decided opinion.

The question which you have heard pleaded for several days with so much genius on both sides of the bar, is described in these terms in your interlocutor :—" The Lords " having resumed consideration of the petition, with an- " swers thereto, condescendence for the petitioner, and an- " swers ; before answer, appoint counsel for the parties to be " heard in their own presence on the question, Whether, " supposing a prior marriage were proved to have been en- " tered into between the deceased and another gentleman, " the allegation of the ignorance of the second husband of " such prior marriage, at the time when a marriage was so- " lemnized between him and the deceased, would be rele- " vant to establish the legitimacy of the defender ?"

This question is entirely new ; at least, I do not see that it ever received a decision of a court of law in this country, though I see that it has been mentioned before by our writers. We must, therefore, in order to decide it, examine the principles of our law, and the sources from which it is said to be derived. *Bona fides* is the only legal principle on which the defender has endeavoured to support his views of the case ; but, in my opinion, *bona fides*, however it may protect a man in some cases, by enabling the person pleading it to argue any personal objection of *mala fides* against the other party, and to maintain his title against any other person who has not a better title than his own, and though it gives right to fruits *bona fide consumpti*, never can protect any man against the *verus dominus*. It may be a good plea against *mala fides*, but it cannot alter the true rights of parties. It cannot make white black, nor black white, right wrong, nor wrong right.

Erskine * says, " A *bona fide* possessor is one who, though

* L. ii. tit. 1. sect. 25.

" he be not truly proprietor of the subject which he pos-
" sesses, yet believes himself proprietor upon probable
" grounds, and with a good conscience, as in the case of
" one who purchases a subject which he had reason to
" think was the property of the seller, but which, in truth,
" belonged to a third party."—" No person, though he
" should possess *optima fide*, is entitled to retain a subject
" not his own, after the true owner appears and makes
" good his claim to it; for the strongest *bona fides* must
" give way to truth."

The application of this principle to the present case leads to a judgment in favour of the pursuer. As long as the defender believed on probable grounds, and with a good conscience, or as long as he was *in bona fide* in thinking that he was the husband of this lady, he could not be prosecuted as an adulterer; he might even have had the *jus mariti* over any estate she might have succeeded to till his marriage was challenged, but after that he would have been *in mala fide;* and, on the principle of the law of *bona fides*, no longer entitled to possession.

The question here is still nicer than ordinary questions about *bona fides*. The party who claims the benefit of the plea is not the same who was *in bona fide;* it is the child, who could neither be *in bona fide* nor *in mala fide*. The father was *in bona fide*, but the mother was *in mala fide*. The child, therefore, is the heir both of a *bona fide* and a *mala fide* possessor. How can he claim on the *bona fides* of the one, without being liable to the consequences of the *mala fides* of the other? The difficulty here is so striking, that Mr Gillies, in his argument, told us of the Canon law making a distinction between the succession to the parents, according as they were *in bona* or *in mala fide*, and that they held that the child would be *pro parte legitimus*, and *pro*

parte illegitimus; but I confess that I have no idea of any such nicety being introduced into our law, nor of its being possible for the defender to plead at all on this new unheard of kind of *bona fides*.

These are the principles on which I apprehend the present question ought to be determined. But let us inquire into the grounds upon which the contrary opinion is maintained. It seems to me to be only on the authority of the Canon law, and of Craig, that this is argued.

As to the weight of the Canon law, I think Mr Gillies was quite right when he said, that it was only as giving reasons founded on equity and experience, and of which we might judge, without being under any tie or obligation to follow or obey it, that the Canon law ever is received as an authority among us, and that the party pleading it must shew that it is reasonable and proper to be followed, or that it has already, by act of Parliament, or by some decision, been received into our law. Neither of these has been done by the pursuer, and we are at liberty to exercise our judgment upon the case ourselves.

As to the opinion of Craig, he, no doubt, lays it down, that the Canon law held *bona fides* to be enough to legitimate the children of such a marriage is this. But it appears to me, that both Stair and Erskine were considerably startled by this doctrine, for neither of them says that it was his own opinion. They both mention it merely as the opinion of Craig and the Canonists. I apprehend, that, so far from adopting it, on the contrary, the presumption lies against its having been their opinion, and any person who is in the custom of reading their works, will think so too; as it is clear, from what they did in other cases, that they would have said something more about it, if they had held it to be good law.

Bankton has been more explicit, no doubt. Even he, however, has given no opinion as from himself, but only says, that " it is probable that it might be found to be the law" with us, if it should be tried.

There is, therefore, no direct sanction of the opinion of the Canonists, excepting this *dictum* of Craig. But I conceive, that the opinion of Craig is not sufficient to make the law of this country on any point where he is unsupported by other authorities; and here it is quite contrary to the clear principles of law, which I have already endeavoured to lay down and explain.

I have only farther to see if this doctrine, now tried to be raised up on the principles of *bona fides*, is consistent with common sense and just views of expediency. It certainly appears to me to be the very reverse. I will not enter into all the cases so ably put by Mr Jeffrey, as for instance, that of the owner of an entailed estate going abroad on purpose, and marrying another woman, in order to get heirs of his own body, &c. but I must say that they were quite satisfactory to me. And, I will add, that another view in which the case strikes me, is, that if we are to hold *bona fides* to be good for the purpose of legitimizing the children at all, it must be good to all intents and purposes. Suppose that this lady had borne a child to her first husband before the connexion between them was broken off. Suppose she had only had a daughter by him, and that she had an estate entailed upon male-heirs. Suppose the instance put by your Lordship during the debate, that she had tired of her first husband, or that any thing else had happened to cause a separation between them after the birth of the supposed daughter, and that she had then married the defender, *ex proposito* to get a male child to inherit her estate. What would your Lordships have done

then? Would the argument of *bona fides* have been pleadable with the same force that it is now said to be entitled to? I am very clearly of opinion, that, unless you let the effect of *bona fides* go that length, you cannot let it go any length at all. No *bona fides* can sanction the second marriage. That is admitted on all hands. The party who was *in bona fide* can derive no benefit from it; and on what principle can the party, who is neither *in bona fide* nor *in mala fide* plead upon it? It seems to me to be quite impossible. And, without troubling your Lordships with any more words on the subject, I am for repelling the defences, in so far as they rest on the grounds which have been yet taken by the defenders.

Lord ROBERTSON.—Though Lord Newton has anticipated many of the observations which I meant to make on this case, for I agree entirely in his opinion; yet, in a question of so much importance to the parties and to the country, I think it my duty to lay before your Lordships all the reasons of my opinion. The case has been argued with great ability by both sides of the Bar; and the deliberations of the Court have been greatly aided by the pains which have been taken by the counsel to clear it up. The hearing was appointed by an interlocutor in these words:—
"The Lords having resumed consideration of the peti-
"tion, with answers thereto, condescendence for the peti-
"tioner, and answers; before answer, appoint counsel for
"the parties to be heard in their own presence, on the
"question, Whether, supposing a prior marriage were
"proved to have been entered into between the deceased
"and another gentleman, the allegation of the ignorance of
"the second husband of such prior marriage at the time
"when a marriage was solemnised between him and the

"deceased, would be relevant to establish the legitimacy "of the defender?"

Ex hypothesi of this interlocutor, the marriage with the first husband was a good and regular marriage. *Ex hypothesi*, also, the second husband was in a state of fair and honest ignorance of the existence of any previous impediment to his own marriage. And in the observations that I have now to make, I shall consider the case as being entirely unconnected with any specialties with which it may be supposed to be attended, and with which it may turn out hereafter to be so.

The first question is, as to the effect of the marriage, considered as between the contracting parties themselves.

I apprehend that, as between them, it is radically null and void. It is admitted, I think, on all hands, that it cannot produce any civil effects, in so far as they themselves are personally concerned. The defender could have had no right to the *jus mariti* after the challenge was made. Neither could he have claimed the courtesy; nor could his wife have had any claim on his estate on her part.

The first consequence to be drawn from this view of the matter, is, that, as a null marriage can produce no legal effects as between the parties themselves, such a marriage cannot produce a lawful child.

This is not one of the best or strongest cases that might have occurred for trying the effect of the *bona fides* of one of the parents, on the *status* of the child; for it is quite clear that the mother was *in pessima fide*. It is the mother's succession that is now in dispute, and the argument is, that the child is entitled to succeed, because its other parent was *in bona fide*; for in this stage of the case, it is presumed that the father was *in bona fide*.

But, then, the question very naturally, occurs, How can this marriage, which can produce no legal effects to the party who is *in bona fide*; produce any effect to the child who is not *in bona fide*, and who could not be either *in mala* or *in bona fide*? This child is not *in bona fide* in any other sense of the word than all other children are; and he is pleading that the *bona fides* of his father can confer important benefits on him, when it is admitted that it can produce none in favour of the father himself. The whole of this argument is very anomalous; and it becomes still more so, when we recollect, that it is the mother's succession which is in question, and that she was confessedly *in mala fide*.

Farther, we may inquire how far this doctrine of *bona fides* is to be extended. If the *bona fides* of the father is enough to legitimate the child of an adulterous marriage, what is to become of the case of an incestuous one? How are we to distinguish the limits where *bona fides* will have this effect, and where it will not? I can suppose a case where a man may marry his own sister in most perfect *bona fides*. Is it to be carried so far as to say, that an incestuous marriage is to be good to any such effect, when the parties are *in bona fide*, and form the connection through ignorance? I do not find that it is argued so high as that; and yet if it is not, I do not see on what grounds a distinction can be drawn, nor how there can possibly be any distinction at all.

But we are told that an incestuous marriage is not void, but only voidable, by the law of England. It may be so; but I hope in God it never will be the law of Scotland.

The effect which has been given in the Canon law to the *bona fides* of one of the parents, was chiefly founded on motives of humanity to the innocent child. Humanity

is a most excellent motive in any individual case; but I cannot help thinking that it is a most dangerous principle, in laying down general rules of law; for we must take care, in doing justice to one innocent party, that we do not permit ourselves to do any thing which may be unjust to another at least equally innocent.

My brother, Lord Newton, put the case of a daughter of the first marriage, if this lady had had one, being cut out altogether by this son of the second; and there can be no distinction, at least no good distinction, between her own child and any other heir-at-law. We must beware how we permit the innocent child of this second marriage to cut out the just right of another party, who is also innocent, and who, if it were not for it, would have an undoubted right to the estate.

I shall say nothing on a subject which was very well enlarged on by the counsel for the pursuers, of a man marrying two or many wives, with the express view of the *bona fides* securing the estate to the children, and leaving many children by these various wives, whom he had all at the same time.

Having made these remarks on the principles of equity, as applicable to this case, I shall now come to the strict legal rules and authorities; and, on this branch of the case, the counsel for the defender dilated most ably; but there is one illustration of it, which I think is an answer to all that they said.

They began with observing, that, by the Canon law, it was admitted that the *bona fides* of one of the parties would give legitimacy to the children; and then they assumed, that as such was the Canon law, such also was the law of Scotland. That it was the Canon law, does not seem to be disputed by any body. But it is wor-

thy of observation, that it was not introduced into that law just so early as has been imagined. The case decided by Innocent III., on which they chiefly founded, was not at first the Canon law, but merely a rescript, or decision in a particular case. It was entitled to the authority of a decision of the Canon law no doubt, from the time when it was pronounced, but it fell greatly short of an act or decretal of that law, till it was introduced among the decretals by Gregory IX.

I will now speak to the extent to which the Canon law is at this day to be held as part of the law of Scotland,—a point of great difficulty, and one which, in spite of all the learning and ability of the counsel who have pleaded the case, I do not think has yet been fully cleared up. I cannot go so far on either side of the question as has been done by the parties. I cannot admit with the one that it is of itself entitled to the authority of law in this country, in all cases matrimonial, and in all questions of legitimacy; and I am not prepared to say with the other, that it never can be held to have been law, unless where it is mentioned in acts of Parliament, or in express decisions. It is clear that the Canon law is not obligatory upon us, in the same way as our own acts of Parliament are. Neither is it as strong as the decisions of the Supreme Court. But still it is quite clear that it is one of the sources from which our law, in matters ecclesiastical and matrimonial, is derived; and it has been followed in the commissary courts both before and since the Reformation. As to all those cases, it is one of the sources of our law, in the same manner as the Civil law is one of the great sources of our law, in almost all other matters.

But Lord Stair, in treating of the Civil, Canon, and Feudal laws, lays it down expressly that none of them have

the authority of actual law with us. His words are *: "These, (especially the Civil law), have great weight with "us, namely, in cases where a custom is not yet formed. But none of these have, with us, the authority of "law; and, therefore, are only received according to their "equity and expediency, *secundum bonum et æquum.*"

This is also the opinion of Mackenzie; and it is the general opinion of all our law writers; and this being the case, it is not enough, in a controverted point, to refer to the Canon law as a sufficient authority for settling the question. I think, before any sound argument can be raised on the Canon law, in such a situation, it is necessary for the defender to shew that it was received either by acts of Parliament or by the Court, or in the opinions of our writers. Lord Stair observes, no doubt, that the Canon law is mentioned generally, "both Canon, Civil, and Statutes of "the realm," in some acts of Parliament; but he does not say that it is received on every occasion, but only in certain cases. Now, if the Canon law is only to be received according to its equity and expediency, *secundum bonum et æquum*, or where it has been already acknowledged by some act of Parliament, or by some decision of our courts, I conceive that it is incumbent on any person who pleads it, to shew that the doctrine laid down is *secundum bonum et æquum*, or that it has been so received. But I conceive, on the principles which I laid down a little ago, that the Canon law cannot be regarded as being *secundum bonum et æquum* in this case; and the question is, If it has been already held to be the law of Scotland in such a manner as to compel us now to receive it as imperative?

Till the time of Craig, I do not see that it ever was sup-

* L. i. t. 1. § 16.

posed to be the law of Scotland; and I do not think it has ever been acted upon as our law since.

Since the pleading, I have been led to attend to some sources of information which were not resorted to by the Counsel, but I have not had time to enter fully into them. I am not, therefore, going to give a positive opinion, but rather to throw out some things as matters of inquiry, from which it appears to me to be very doubtful, how far we can be said ever to have adopted the general Canon law, as of any authority at all, without some special form of doing so. What I allude to is a copy of the Acts of our old Provincial Councils, which I think is calculated to throw much light on this question; for it appears to me that these Provincial Councils contain the whole body of the Scotch Canon law, and that no part of the general Canon law could be called part of our law, till such time as it was made part of the decrees or acts of that particular system of Canon law.

From a very old period of our history, provincial Councils were held in this country. Sometimes they were held under the authority of special bulls from the Pope, which was the case, in particular, prior to the time when we first had an Archbishop; and after that time they were held under the authority of the Archbishop. They were held for the consideration of ecclesiastical matters in general; and, among other things, they regulated the proceedings of the ecclesiastical courts. I find, that, in many of them, the canons were just copied from the general books of the Canon law. But I also find, that the authority of a provincial Council was necessary to give the canons any authority at all in the courts of this country. These provincial Councils were not held merely for the purpose of promulgating the general Canon laws in this country, but for the purpose of enacting them into laws for themselves, if they approved of them; for they do not mere-

ly declare them in that kind of way in which they would have done it in the former case, but they use positive enacting words; and it is only some of the general Canon laws, and not the whole of them, which they adopt; and they make constant use of such words as, *statuimus, ordinamus*, &c.

In so far as I have yet had time to look into these books, I cannot find in any one of our Scotch provincial Councils any authority which recognizes the doctrine of Innocent III., by which legitimation by the *bona fides* of one of the parents is said to have been introduced into the general system of law.

Lord Hailes, in his Historical Memorials, observes, that none of our law writers had looked into these provincial Councils, and I think it is from that circumstance, that they had been led to attribute many things to the authority of the general Canon law, which really were owing to the decrees of those provincial Councils. And as an instance of that sort of thing, I may mention what Erskine says on the subject of proclamation of banns *: "Publication of banns was first introduced by the Lateran Council, which was holden in "1216, in general terms, without specifying in what churches, "or how often the publication was to be made. Afterwards, "the Council of Trent ordained banns to be proclaimed on "three successive holidays, in the parish church, or churches "of the persons contracting; and this canon was adopted "by our first Reformers, and hath been ever since observed "by our Church."

But, on looking into the proceedings of our own provincial Councils, all this doctrine of Erskine turns out to be quite erroneous. If he had looked into them, he would have seen that this doctrine with regard to the proclamation of banns

* B. i. tit. 6. sect. 10.

was received in Scotland long before the Council of Trent, on the authority of one of our own provincial Councils.

The rescript of Innocent III., which is dated in 1213, was, at any rate, not adopted immediately in this country. A provincial Council was held in 1221, and in so far as I have been able to see, no notice was there taken of his rescript. In 1242, another provincial Council was held, and though their proceedings contain several chapters on the law of marriage, not one word is contained in them as to the authority of the rescript of Innocent III., which was passed twenty-nine years before. I have not yet had time to go farther down in the examination of these provincial Councils than that year, but it will be well worth the while of the parties to look into them; and if it is not found to have been received in any of them, I think it will be quite clear that it ought not to be introduced into our law now.

I now come to the opinion of Craig. His authority is considerable; but I think he has gone too far in what he says as to the authority which the Civil and Canon laws have with us. He thinks that the whole doctrine of the Canon law has been adopted by us *per aversionem*; but it appears to me, for the reasons I have stated, that that is not the law of this country.

As to the authority of Lord Stair, I do not think much can be made of it. Though he quotes the passage from Craig, he gives it merely as the opinion of Craig. He does not add the weight of his own great name to it; and we all of us know, that, if he had been of the same opinion, he would not have been slow in expressing it.

Lord Bankton says, it is probable that the same rule would be followed with us, if the case were to occur; which I consider as an admission by him that it had not been followed before his time, for if he had thought that it was Stair's opinion, he would unquestionably have said so.

The same remarks may be applied to what is said by Erskine on this point.

A great deal has been rested on what is said to have passed in the case of Campbell against Cochrane; but your Lordships will remember, that this was not the question which was then before the Court. It was only argued on incidentally, and it was not necessary to examine it in any other way. There was no occasion for the parties to argue it, nor for the Judges to consider it, with that deliberation which the important nature of the question entitles us to presume that they would have used, if they had been to give a decision on the point. And though it has been said, that all the judges in that case were of the opinion, that *bona fides* legitimises the children, I consider it as rather an *obiter dictum* than as a deliberate decision, which we can now follow as a precedent, or which we are at all bound to respect, unless we are ourselves satisfied that it was right.

Another case was decided about five years after that of Carrick, which convinces me that the lawyers of that day did not understand it as settling the point. I allude to the case of Pennycook against Grinton and Graite. The facts of that case must have called the attention of the Court to the question of legitimacy, if it had been thought to be possible to render a child legitimate by means of *bona fides*. Grinton debauched a young woman, Alison Pennycook, under a promise of marriage. She bore a son, whom he acknowledged to be his, and presented to the minister to be baptised. After this he declined to adhere, and she pursued him before the Commissaries of Edinburgh; but she did not conclude to have him declared her husband, nor did she insist upon having the legitimacy of her child declared, but only for the expences of childbed, for aliment to the child, and for damages. In this process he acknowledged the courtship, the promise, and the copula,

but still no claim was made upon him. Grinton was therefore *in optima fide*, in entering into a second marriage, and some time afterwards he married another woman of the name of Graite. Some time after that, Pennycook brought another action against him, in which she concluded for declarator of marriage in her favour, and declarator of legitimacy in favour of her child. By this time Grinton had had a child of the second marriage, and the attention of the Court was therefore called very strongly to the question of legitimacy. The information for the defender was drawn by Mr Lockhart, a man of great eminence, and who cannot be supposed to have been ignorant of what passed in the former case of Carrick. And yet he pleaded, that the establishing the first marriage would have the effect of bastardizing the issue of the second.

But granting, what is very unlikely, that he had forgotten that case *, still, if it had been the general understanding of the gentlemen of the Bar at that time, that the *bona fides* of the second marriage could have had any effect on the legitimacy of the children, it would have been very natural that the counsel on the other side should have met the argument by saying so; but no notice was taken of it.

On the other hand, the pursuer would naturally have pleaded, on the authority of that case, that, though the *bona fides* might legitimate the child, still it could have no effect as to the marriage itself, and yet no notice was taken of it; and I observe, that the counsel for the pursuer was Mr Fergusson of Pitfour.

I am sorry that I have taken so much time to deliver my opinion. I should be very well pleased, that an oppor-

* Mr Lockhart was himself counsel in that case.

tunity were afforded to the parties to investigate these matters a little more than they have yet done; but if I am to give my opinion as the case now stands, I must say, That I think the *bona fides* of one of the contracting parties is not sufficient to legitimate the child.

Lord Glenlee.—This is a question of great nicety, and in so far as concerns the individuals themselves, it is one of great importance. But as to its importance to the public, I have seldom seen a case in which there was so little to excite general interest, except in so far as it is concerned to see justice done to individuals.

The public cannot be much interested, unless a great number of individuals are so; but I do not see how, in such a question as this, any great number of individuals should ever be interested. The case has not happened for two hundred years since the time of Craig, though I think that, ever since his time, it has been held to be the law of Scotland; and how it should be more common for two hundred years to come, I really cannot well see.

Suppose judgment to be given in favour of the plea of *bona fides*, I do not fear the consequences held out, of people deserting their just marriages. Before any such consideration ever can be listened to, there must be a cause of *justus error*. Therefore, as to the case of a prince, put by Mr Gillies, going abroad, or coming down to this country in disguise, after having a daughter by his lawful wife, and getting a son, who might occasion disturbance in the kingdom, I have no great fear of it. I have no idea of a prince, or of a private person either, accomplishing a marriage in that manner; at least there is no great risk of it. There are many circumstances which must concur, before any question of this kind can arise. There must be such circumstances as plainly to shew, that the innocent party had no reason-

able cause of suspicion. Indeed, in every view, I really do think the danger is more one of imagination, than a solid case for judges to found their determination upon. In general, the rights of parties are settled by contracts of marriage; and so really, whatever may be the *bona fides* of the parties in entering into the second marriage, the rights of the other family will be settled by the first marriage-contract. I, therefore, do not see that this kind of general objection which is raised on the supposition of *ex-proposito* marriages, is one of any consequence; and it is needless for me to say more about it.

As to the authorities in point of law, I see that there has been no decision fixing the matter. But still it so happens, that the case (though no doubt merely as a hypothetical one) has been investigated with a considerable degree of care by the writers on our law, so that it cannot be said to be quite a new one; and their authority, so far as it goes, is all one way; it is all in favour of legitimation by *bona fides*.

Craig's opinion is clear, and it is not given merely in an *obiter* manner, but most expressly in favour of the defender's argument, on a distinct and separate consideration of the subject.

Then comes Lord Stair, who to be sure only states it as the opinion of Craig, and the canonists, without saying any thing either for it or against it. But, I confess that his silence weighs very much with me in favour of the defender. Stair always mentions expressly when he differs from an opinion of Craig or of any other writer, and it would have been contrary to the spirit of authorship, (what is now, what always has, and always will be their spirit), to have omitted any one occasion of pointing out the error of former writers.

Erskine in like manner says nothing against it. And Bankton is expressly for it.

In the case of Carrick, there is, no doubt, from the statement of Lord Elchies,—I say there is no doubt at all, that the opinion of the whole Court was in favour of legitimacy. It is maintained, that what was said on that occasion, must be held to have been an *obiter dictum* of the minority of the Court, in which the majority did not agree. I cannot conceive how that should be. If the report can be trusted, so far from having been an *obiter dictum*, it was the very reverse, and was the only foundation of the judgment which was given. An *obiter dictum* is something thrown out which has nothing to do with the case at issue. But there the judges were agreed on this matter. The second marriage was at an end in the course of nature; and, therefore, there were no *termini habiles* for setting it aside, therefore they would not allow the investigation to proceed. That was the reason of the opinion of the majority of the Judges; but is that to say that they entertained an opinion against the legitimacy of the child? When a judge adopts any principle of law, and lays it down as the ground of his opinion in a particular case, there may be a mistake as to the principle, or as to its application to the case before him, but still it cannot be called a mere *obiter dictum*. I cannot admit any such view as that, where he gives an opinion directly arising out of, or leading to, the case before him. I conceive the minority, who thought that the first wife had a sufficient title and interest to ascertain her own *status*, were in the right. But that does not diminish the effect of the opinion of the whole Court, (for that was the effect of their finding), that the children of the second marriage were legitimate.

I therefore cannot help considering that as a strong authority in favour of the defender in this case.

As to what passed in the after-case of Grinton and Graite, I cannot say that I know so much about it at pre-

sent as to give a direct opinion upon it; but from what I remember of it at present, on the mention of it by Lord Robertson, I do not see that the first wife could have been deprived of her *status*, if she had any right to that *status*, whatever might have been the effect of the second marriage in that case; and, therefore, in settling the question as to the first marriage, there might have been no occasion to speak of the children of the second.

Against all opinion pressing strong on one side, then, what are we told? We are told that Craig's opinion rests entirely on the Canon law. And we are also told, that his opinion is wrong, from giving too much weight to that system of law. But, I do not see, that, either before, or since the time of the Reformation, we have been in the way of giving either more authority to it than Craig gave it, or less. We may differ about particular points of that law; but, in like manner, neither does he say that it is to be received against the dictates of our own law, or when it is unreasonable. He does not seem to have been inclined to receive it in any different manner than we do at present. There is no doubt, that if it does appear that it is an unreasonable doctrine that is attempted to be introduced from the Canon law, it ought to be rejected.

Now, in the argument, we were told by the pursuer, that the plea of the defender was quite inconsistent with the principles of our law. We were told, that the very definition of legitimacy depends on marriage, and that there can be no such thing as legitimacy, excepting through the medium of a lawful marriage. This was *surely* making very short work of the question indeed. Whatever there may be in that argument, it needs no great penetration to find it out. It is impossible that Craig, Stair, Erskine, and Bankton, should all have been ignorant of the fact, if it is one; or that they should have omitted to men-

tion it in any part of their works, or to have perceived that it completely overturned this doctrine of *bona fide* legitimation, which all of them mention, some of them adopt, and none of them contradict. Do any of them say, that the child, in such a case as this, of which they all speak, was rendered legitimate by rendering the marriage a good one? By no means. They tell us the very reverse, for they say, that the *bona fides* legitimizes the child, in spite of the nullity of the marriage.

But this argument, from the definition of legitimacy, is a great deal too general. I am not fond of generalizing too much in applying the rules of law to practice; but there are two general rules, of which I am very fond, One is, "*Omnis definitio in jure periculosa est;*" and the other, "*Non jus ex regula, sed regula ex jure.*" And I really do not think, that this doctrine of legitimation on account of *bona fides*, is any violent measure in our law. I am sure there are many parts of our law of marriage, which are quite as inconsistent with general principles as this. Take the case of legitimation by subsequent marriage, and of marriage constituted by promise and *copula*. How can these be explained on general principles? As to determining any difficulty of the kind by a *fictio juris*, it is ridiculous to attempt it in that way. The expression *fictio juris*, is a mere jingle of unmeaning words, which is applied in every case, where there is a departure from what are called general rules. It is just another way of saying, that it is an exception; but it is quite ridiculous to say, that a *fictio juris* has any effect at all. It is not on account of a *fictio juris* at any rate, that subsequent marriage legitimizes children, but on their own account. Now, there is an instance of legitimacy, where the children are not born in lawful wedlock, for they had been born bastards; and no fiction whatever can alter what is past, and

make it a fact that they were not born bastards. The rule, therefore, is no *fictio juris*; it is just an exception from the general rule. Now, that case is just as much an exception to the rules of law as to bastardy as the present; and I cannot see any reason why the one should be law, and not the other.

We are then told, that it is the *bona fides* of the parent and not of the child; and we are told, that both of the parents were not *in bona fide*.

The *bona fides* of one or other of the parents is the circumstance on which a *jus quæsitum* arises, in favour of the child. Legitimacy is not like an estate, which a child takes up at his father's death. Children do not claim legitimacy in and through their father's *bona fides*, but on the matter of fact, that there was a marriage, or the appearance of a marriage, in particular circumstances pointed out by law. Their right arises to them *suo jure*. The child of a subject of this country, though he may be born abroad, is not an alien; but he does not claim the right of being a subject of this country through his father. He claims it in consequence of his father having been in such a situation by law, as to enable him to get children subjects of this country, and not having committed treason. The child claims it *suo jure*,—not in the same way as he would claim an estate. In the same manner, in this case, I conceive the *status* of legitimacy to belong to the child *suo jure*; in consequence of its parents having been in such a situation as to make the world believe, and to make the child itself believe, if it was old enough to know any thing about it, that they were *in titulo* to get lawful children.

I do not see that individuals have any thing to do in this case, and the pursuer does not say that they have, for he deprecates most strongly any consideration of that kind.

I do not think that there is occasion to say much upon the question in the light of natural justice; but for all that, I am on the whole for adhering to the authority of Craig, and to what appears clearly, from the best evidence, to have been the opinion of all our predecessors. But at the same time, if the pursuer would shew me any thing in the way of a change of our law, or of our manners and principles, sufficient to induce me to do so, I might be for rejecting the defender's doctrine still, for I admit, that there has not been any express decision on the matter hitherto. In the mean time, it appears to me, that the question of expediency lies altogether the other way, for the leaning of our law has all along been to give more and more facility to the constitution of marriage. For instance, I do not think it was so well known in the time of Craig, as it is now, that a *copula* following a promise, made up for the want of a regular marriage. To be sure, long before that, it furnished a ground for an action before the Commissaries, against the party refusing, to compel him to complete the marriage. At the same time, it is not clear, from the opinion of Craig, if a mid-impediment had occurred, either by a subsequent marriage to another, or in any other way, what redress the injured party would have had. But, I conceive it now to be law, that, if a man debauch a woman on promise of marriage, and afterwards marry another woman, the first will be, to all intents and purposes, his wife. Now, a man who has done this, may be publicly married to another woman, who may know nothing at all about it, and who may have no means of knowing it, for that sort of transaction is always of the most private kind. The first marriage cannot be set aside, because the mode in which it took place is good and legal in our law. The second marriage will fall to the ground, by the

declaration of the first. The second wife will not suffer in the opinion of the world if she conducts herself properly, and I conceive that, in some respects, her right ought to be preserved. But I cannot conceive that the child should, in the estimation of its *status*, have any thing of that stain upon it, which instinctively attaches to one who is a bastard. Now, would it not be very extraordinary, if, in such circumstances, the law were to bring down the child to the level of a bastard, and an adulterous bastard. I conceive that it would be very hard and unreasonable to stigmatize and degrade those against whom the whole world can point out no objection. It seems to me to be quite contrary to all analogy, and therefore, on the whole matter, I am for sustaining the defence.

Lord Meadowbank.—I am sorry that there should be any difference of opinion amongst us on so very important a case as this; and I am just as sorry that I cannot agree with my brethren on the other side, as I am that they cannot agree with me.

In my mind, the weight of authority is decisive and clear upon the point; and without examining principles, I do not feel myself at liberty, sitting here as a judge, and bound to interpret the law, and to apply the law, and to infer from the law legitimate consequences,—I do not, I say, feel myself at liberty to pronounce a judgment in this case, in contradiction to all the authorities of the law. Can I pretend to say that I can sift these authorities better than has been done before; that I am wiser, and that I will do it better than my predecessors did in the case of Carrick, who were all of opinion that the *bona fides* of one of the parties secured the legitimacy of the child?

That was the universal sentiment of the judges of that

time, founded on the sanction of the authority of all the fathers of our law. Am I, at this day, entitled to alter it, even if I thought it wrong? Even if I did not understand the grounds of it, I would submit, and bow with deference to what they have done in so important a matter as this.

I conceive that a court of justice is not entitled to alter any such decision as this. If an eminent counsel in this country had been asked for his opinion,—I shall suppose, for the information of any foreign Court,—as to what was the law of this country upon the point; could he have come here and have asked us to try a hypothetical case, in order to enable him to answer the question, or to solve any doubts which he might have entertained of the propriety of the opinions in our law-books on the subject? I conceive he could have done no such thing; he would have been bound to take the law as he found it in his books; he could have said nothing else than that such was the law of Scotland, whatever he might privately have thought as to its propriety or expediency. And sitting here, after the understanding has been so long and so universal on the point, I do not feel myself at liberty to do any thing else than what any eminent counsel, in such a situation, must have done. I am quite clear that this has long been considered as law in this country. Craig's opinion is mentioned without objection by Erskine and Stair, and it is approved of by Bankton. What would your Lordships think of a Lord Advocate, or a Dean of Faculty, who would have doubted it? And if they could not have doubted on it, neither can I.

I agree in every word that Lord Glenlee has said; and as I hate to repeat what has been already said so well, I will endeavour to be as short as I can. And though I agree with him in all that he has said on the case, I do so more particularly in his observation, that it is a most obvious fallacy to

maintain, that, excepting through the medium of marriage, there is no legitimacy, and that a null marriage can produce nothing but nullity. It was an examination of this induction which first led me to form an opinion upon the case. And the opinion that I have formed is exactly the same as that of all our authorities.

Let us see if there is any thing that the law recognises in that induction. A gentleman finds a lady in the situation of a single woman. No objection to the marriage appears on the part of any person. He marries her, and takes her home with him; and the marriage is terminated by her death, at the distance of a twelvemonth, without any objection having been started by any person. Is it nothing that all this takes place? Suppose a declarator of marriage by the first husband to be brought, or a declarator of bastardy against the child, does that alter the whole state of the matter? Can there be a *restitutio in integrum* in such a case as this, as there may be in other cases of mistaken *bona fides?*

I conceive this matter to be material and most important in all its consequences. I can imagine nothing more obvious than that this, as a case of a putative marriage, must have very important effects. Lord Newton did not dispute that it might have the effect of giving the husband the *jus mariti.* But is it not attended with many other effects? Were not all the reciprocal duties and rights of a real husband and wife created between these parties? Would there not have been room for an action of divorce for adultery by one of the parties against the other? Could they not have had action for separation *a mensa et thoro?* Would there not have been the oath of calumny for carrying on an improper action against either of them? Might not both the lady and the gentleman have been tried criminally, if they had vio-

lated the duties which the law imposes on the possessors of such a *status* as this, properly constituted.

It is not alleged, in this case, that there was any consummation with the first husband; and I imagine that it is the common law of marriage, that, without a *commixtio corporum*, no affinity is constituted. I conceive that the whole of the question as to the marriage of Henry VIII. with the widow of Prince Arthur, proceeded on that authority. He would not have been permitted to marry her in that event, or it would have required an act of Parliament to get the better of what was the general law of Europe.

I conceive that I could not have tried this lady for bigamy or adultery with her second husband, without a *commixtio corporum* with her first husband. This putative marriage is much stronger than the one which was first celebrated, if it was not followed by consummation. It has much more powerful effects. The civil and the criminal law touches its connection more powerfully. Is that marriage to be annihilated, because a question arises after the death of one of the parties? And are the rights of parties to be annulled and put an end to in such a situation?

I conceive, that, by all these circumstances, a *jus quæsitum* has arisen, both on the part of the child and of the public, which cannot be got the better of by any after discovery that it was all a mistake, in consequence of a prior marriage. It is not every thing of this kind which can undo all that has taken place. We all know the stories of Barbarius Philippus, and of Pope Joan. Their acts and deeds were not annulled on the discovery of the mistakes. If, by some strange accident, the Archbishop of Canterbury, and the Lord Chancellor of England, should turn out to be women, would the judgments of the one, or the ordinations of the other, be thereby annulled, merely be-

cause the person who gave them, turned out to be a woman and an impostor? I conceive that nothing would be more dangerous to society than that would be; and I conceive, when matters come to be in that outward form which gives a connexion every appearance of a lawful marriage to the parties concerned, and to the public, that the very same consequences must, in the same way, arise from it, and must be as unalterable, by any after discovery, as in that case. If you constitute a putative *status*, you unhinge society altogether, if you afterwards pretend to alter that *status* on the pretence of one of the parties having been an impostor.

This absorbs all the question. I do not at all enter into the views of Lord Robertson. Here there was a putative marriage, acknowledged by all the friends of both parties, and by the general admission of society of the legality of that marriage; in consequence of which the child, at one time, enjoyed the *status* of legitimacy. Is there any doubt that such a *status*, so constituted, must stand in spite of any thing that might afterwards come to light. The child was one of the effects of the putative marriage. It entered into the world in possession of a lawful *status*; it had actually obtained it in the opinion of the world, and can the Court now take it away, without any fault on the part of the child?

I do not enter at all into the discussion, as to the authority of the Canon law, and the law of England. The fact is, that I consider the Canon law as never having been authoritative in this country. I agree that it must have the authority of the law of this country interponed to it in some shape or other, before it can be received; and you see in the history of the Church constantly, that such a law of the Church was received in such a country, and not in such another; and, therefore, I am clear, that it has not of itself

any binding authority. But I think that it is undoubtedly of authority as one of the fountains of our law, though not as law itself, and I think that its doctrines ought to be received in this case. And I must make one observation on the subject of the English law, which I think goes far to clear up any difficulty which the decision of that law has occasioned in the deliberations on this matter.

Your Lordships perhaps do not know the fact, that, by the law of England, questions of legitimacy do not belong to the Ecclesiastical Courts; but questions of marriage do belong to them *privativè*; now, that circumstance alone is sufficient to account for the very different rules of law that have been introduced into the law of England, as to the legitimacy, and as to marriage.

The common law, both of Scotland and England, disowns marriage by promise and copula, but that dislike was got the better of in this country, and not in England, because the matter came to be subject to the *Curia Christianitatis* in Scotland and not in England. *Nolumus leges Angliæ mutari* was said upon that very point, at the Parliament of Merton. But the *Regiam Majestatem* shews, that, in this country, effect was very early given to putative marriages, and I am not yet satisfied, that the law of England (whatever distinctions it may make) is different in every respect. Nay, I will say, that such is the regard of our own law, and I imagine of the law of England also, to the *status personarum* established by means of putative marriages, that it is hardly possible, if at all, to get the better of it.

You see very distinctly, that our forefathers gave the effect of legitimacy to putative marriages. Now, what does the law of England do? It refuses to give any such effect to them, or any effect in a direct manner. It refuses to declare the same thing in words that we do. But it does the very

same thing in effect. It does a much stronger thing. It expressly prohibits the *Curia Christianitatis* from disturbing a marriage, after the death of one of the parties. And, why? Because, as we may gather from Blackstone, it would bastardize the issue, without operating the only end for which it was allowed, the reformation of the parties; and, besides, the party attacked would not have so good and favourable an opportunity of defending himself, as if the parent were alive, and might be unsuccessful in a good cause, merely from ignorance of the circumstances. If this case had happened in England, and if the first husband had brought his action in England, at the time this action commenced here, for the purpose of trying the question of his marriage, the law of England would not have declared the child to be legitimate. But an order would have issued from the King's Bench, prohibiting the Ecclesiastical Courts from trying the question:—that is the law of England.

I apprehend we would not wish to imitate this mode of proceeding, nor to make our courts of law stop the course of law, in order to prevent the existing *status* of a party from being disturbed. Is it not much better to acknowledge, and to act upon the fact, that a putative *status* is a good *status* to the person possessed of it? It seems to me to be a much more rational mode of proceeding.

I believe that, in the practice of England, that circumstance which seems so odd, and which disgusted Lord Robertson, of giving effect to an incestuous marriage, on account of *bona fides*, may very possibly have originated from its having been the old Canon law of the country, and from its not getting into the Church Courts to be examined into, when the separation between the different kinds of cases took place. And it seems also to have been the law of Scotland, at the time when incest was first declared to be a capital crime. It is a fact, that, in our system of society, it is a

crime, but it is not contrary to the law of nature; for brothers and sisters, we know, must have intermarried in the beginning.

It is very strange, that the law of England ascribes to one putative marriage the effect of completely legitimating the children; and that too putative marriages of the most disgusting sort. An incestuous marriage has been found to be attended with that consequence. It seems to us very strange, that a man's son by his own mother or grandmother should be legitimate, for that is admitted, and pleaded on by the pursuer in this case. And is it not very strange, that the defender should not be legitimate, if he is merely the son of a second marriage, contracted during the existence of the first, though in the most complete *bona fides*? If we are not tied up by former authorities, it would be very odd if we should go into this distinction between the two cases, when it is a distinction which must be admitted to be so very absurd.

On the whole, it appears to me that we are not at liberty to depart from the authorities of the law. But, if it were an open case, I would not hesitate to say, that putative marriage should have all the legal effects, in regard to third parties, and to the children of the marriage, that actual marriage has.

Whatever your Lordships may do, I hope you will pronounce such a judgment as to keep the matter open as to that most important point, the competency of entertaining any such questions at all: For in England, whatever strict law may say, I am satisfied that they would not be entertained in any of their courts.

If it is competent to the Court of King's Bench, as I understand it to be, to issue a prohibition against trying the validity of a marriage, after the death of one of the parties in a direct manner, would it be competent to that very Court of King's Bench, or any other English Court, to go into the

trial of the very same question, incidentally occurring in the course of the discussion of another action, for a different purpose? That seems to me to be such an anomaly, that I believe it to be quite impossible.

Your Lordships will also attend to this circumstance, that here consummation is not alleged to have taken place with the first husband; and I do say, laying all subtleties out of view, that this is a most important consideration. Suppose the lady to have been married, and that she had never been taken by the hand, nor acknowledged by the man to whom she was married, and that he had gone away and left her a virgin here, and she married again, and had children to her second husband;—I say it would be a matter of very serious consideration with your Lordships, whether you would order her to leave the man, and the only man to whom she had surrendered her person, and to go back to the other, who had treated her in the manner I have supposed. That would be a very serious case, and it ought to be kept open for consideration, if it should ever occur. I do not mean to give any opinion upon it here. But, in the mean time, I am quite satisfied, on the grounds which I have stated, that the defences in this case ought to be sustained *.

Lord Polkemmet being unwell, could not enter into the detail of his opinion; but he requested the Lord Justice-Clerk to say, that he had considered the question very deliberately, and had formed a decided opinion that the defences ought to be repelled.

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* The notes which Lord Meadowbank had prepared, and from which he delivered his opinion, are preserved in his Collection of Session Papers, and will be found at length in the Appendix. They are valuable, from their containing his views of the case, unmixed with the views suggested by the remarks of the other Judges, who spoke before him.

Lord JUSTICE-CLERK.—This is certainly a very important and a very nice case. And, I am happy to find myself in the situation of my brother Lord Meadowbank, of being almost relieved from the necessity of forming any opinion at all. Conscious as I am of my inferiority both in knowledge and ability to the Judges who sat in this Court at the time of the case of Campbell and Cochrane, and the great lawyers who have written on the subject, I would have held myself to be bound by the weight of their opinions. But at the same time, my opinion is just the same as that which they entertained. In so far as I am capable of forming one, my opinion coincides entirely with those of Lords Glenlee and Meadowbank.

In one sense of the word I agree with Lord Glenlee, that, in so far as the public is concerned, this may be considered as a case of no great importance; for it is one which never happened in this country before, and in all probability will never happen again. At the same time, I have some doubts of this having arisen from the fact of there never before having been such double marriages as this; for my own impression is, that the reason why the question never has been agitated in a court of law before, has been from the reliance which has been universally placed on the opinion of the Canonists, as handed down to us by Craig, and all our other writers.

In considering the question on grounds of expediency, as to what may be the consequences of a judgment either in favour of the one party or of the other; while I confess that the dangers pointed out by the pursuer seem to me to be more than chimerical, I can see very great danger, indeed, if we pronounce a contrary judgment. The case must often have occurred, at least in point of argument and plea, if the effect of *bona fides* had not been universally held to be law; and dangerous, indeed, would be the conse-

quences of the law, if *bona fides* could not legitimate the children of such a marriage, as it would open a way to the most atrocious frauds.

Look to the decisions of this Court; look to the numberless cases in which attempts have been made to carry off estates from the lawful heirs; look to the innumerable instances of perjury in cases of deathbed,—and in most cases, perjury, I am afraid, is too common,—at least great prevarication is;—and judge if such questions as this would not have frequently occurred, if the succession to persons deceased could have been carried off by such an allegation, as that a previous marriage rendered the children of the second illegitimate, notwithstanding the most complete *bona fides* on the part of its parents. A man marries a woman of mature age, from whom he expects good and proper conduct. Indeed a man, when he marries, may be held in some respects to warrant the prudence and conduct of the woman whom he selects for his wife; and if he marries, from proper motives, a woman come to the years of discretion, he must be dealt with as if he were willing to do so. But if the *bona fides* of the parents is not to receive effect from the law, a man must do a great deal more,—he must warrant the prudence of her childish years;—not merely the prudence of that time of life when he marries her;—but he must warrant himself from the most loose, the most unmeaning, and the most childish ceremony that may have taken place from the time that she was twelve years of age. He may be certain of her virtue, and he may be certain of her prudence, at the time of the marriage; he may be willing to undertake that risk; but he cannot be certain of the prudence of any child at the early age of twelve. If the pursuer's argument, therefore, is to be sustained by your Lordships, then I say, that, excepting in reliance on one's own *bona fides*, no man can now go down to the

grave in peace or with any certainty of the legitimacy of his offspring. For what is easier, when a man is dead, and cannot contradict it, than to make such an allegation as this, that he had been married before? The second husband in this case happened to have been married only one year, and to have had only one child; but, if the pursuer's argument is good for any thing at all, it would have been as good after twenty or forty years' cohabitation as after one; and after every means of proving the falsehood of the allegation had been lost.

And who could assure himself that he would ever be able to prove the falsehood of such an allegation made at any time. It must often be a very easy matter to set aside children, without the least reason being afforded for it by the conduct of any one of the parties. We must all be convinced of this, after the many attempts at perjury and injustice that every Judge must have seen. We must be convinced of the dreadful facilities which the pursuers' argument must give to such attempts on the estates of others. According to that argument, even the surviving husband is not a necessary party in such a case. Here no husband appears, though we are told that there was one. We do not legally know any thing about him. Even in this case, the fact may be, that the whole story is false, and yet, it may now be impossible to prove that it is so, since the lady, the only person who knew the circumstances upon which the story is raised, is dead. I do not mean to say that there really is no such person, but even if there were not, the same story might have been told. We see that he is not in the field. No claim was ever made by him. Then, at whose instance is this action prosecuted? If the action is to be good at the instance of any third party, what protection can a person have whose legitimacy is attacked in such a manner? The first hus-

band cannot be brought here by this Court. Then, in the hands of a third party, how are we to get at the justice of the case? Suppose the first husband were also dead, so that he could give no aid in detecting the falsehood, if it is one. Suppose he should not consent to come, or to answer our commissioner, which he may refuse to do if he pleases. Then while he is making no claim, what is to hinder all this story about him from being false, and what consequence would the permitting a third party to make the claim lead to? What facilities for perjury and fraud would it not give? Suppose an itinerant priest, as in the case of Heriot *, who may be willing to certify any thing for payment, or suppose a forged certificate, without any priest at all, as in the case of Cuninghame †. What earthly means would the party attacked by such weapons have of defending himself, if the alleged first husband were silent, and the mother were dead?

We may suppose a different case. We may suppose that the second husband had died first, and that one of his relations had come and insisted that his widow was the wife of the first husband. The proof might be satisfactory to us, and we might find that she was so; and yet our finding it, would not make her so. This, therefore, is really a very anomalous proceeding. No judgment which we can pronounce in this case will make this lady to have been the wife of the first husband. And, in the case which I have supposed, she might have had no evidence to satisfy the courts in Ireland, or he might have had evidence to shew that the whole story was false, and yet that could not have done away our decree. This, at least, shews that this is a very strong case; and leads me to doubt very much, whether, when such a decision as we could pronounce would

* The Case here alluded to was decided about the year 1790, but was not reported.

† Fac. Col. 8th March 1810. Note.

have no effect in establishing the fact which we find, we ought to pronounce any decision at all. We ought to go very deep into the matter, indeed, before we pronounce a judgment that bastardizes the defender, on the allegation that his mother was the wife of another man, while that judgment would not make her to have been his wife, which our finding the fact would not do.

And why should we bastardize the child? Is it from the weight of previous decisions? Is it in obedience to an act of Parliament? Is it from regard to principles of justice? No. We are to do it, it is said, because the lady was the wife of another man, and yet our judgment will not make her to have been so. And he never claimed her. He may refuse to acknowledge that she was his wife, after we shall have found it. No claim was made on her in that character during her life. No claim is even yet made through her, by any one alleging that she held that character, in consequence of her having held it. Why is it, then, that we are to pronounce this judgment? It must be on speculative grounds alone, or on our own abstract apprehension of the matter: And that alone is enough to convince me, when I see every weight of authority exactly the other way, that we ought not to do it.

I shall not go into the authorities. We have had too much discussion, on both sides of the case, as to the authority of the Canon law. I know no authority which the Canon law, or any other law, has in this country, except in so far as it has actually been adopted. But as to matters of marriage, I never thought, at this day, to have heard a doubt on the subject; for, if the Canon law is not our law of marriage, I would be glad to know what is our law of marriage. In all questions of marriage and legitimacy, the Canon law is the law of Scotland. And the reason is plain; it was assigned by Lord Meadowbank,

that all questions of this kind were left to the Consistorial Courts.

Lord Robertson made what appeared a very obvious remark, that it was very odd that the rescript of Pope Innocent III. was not known in Scotland thirteen years after, and twenty-nine years after it was pronounced, and said it would have been inserted in our provincial Councils, if it had been meant that it should be adopted at all. But your Lordships will observe, that that rescript was nothing more than a judgment of Pope Innocent III. It was not by any means part of the Canon law, when he pronounced the judgment, for any thing that we know, the first of the kind that had been delivered. It was not a bull, and therefore it was not known as the Canon law, till it was embodied in the law by the Decretals of Pope Gregory IX. The date of the compilation of these Decretals, therefore, must be held as the date of the introduction of this doctrine into the Canon law. Before that time it was an authority, as all decisions by competent courts are, but it was not law; and therefore, it is not at all extraordinary that it was not introduced into the decrees of the provincial Councils of Scotland, at the time that Lord Robertson mentions. It was just in the same situation as many of the judgments of the Roman Emperors, or as the opinions of Caius and Paulus, or other Roman lawyers. These were all precedents, but none of them were parts of the Civil law, till they were embodied in the Pandects by Justinian. Then they became law. Before that they were only the opinions of eminent lawyers, from which other eminent lawyers were entitled to differ. In the mean time, they were entitled to all the weight that the opinions of such men might deserve, in the way of example, but to none at all as authorities. Innocent III., whom Mr Thomson shewed to be one of the best and ablest Popes that ever lived, gave this as his opinion on

the case, which was submitted to him; and it was not adopted at first, but was a mere precedent like other decisions. But it was adopted as public law by Pope Gregory IX., who compiled the Decretals; and it has continued to be law ever since, in countries governed by the Canon law, as we were in matters matrimonial.

In the same manner, as to the *Regiam Majestatem.* No doubt, there have been disputes as to the time when it was written, and the source from which it was drawn. It has been matter of doubt whether it was copied from Glanville, or Glanville from it; but no man ever doubted of its authority in Scotland; for there are a number of our first statutes in which reference is expressly made to the Books of the Majesty; and there is one statute of James I.*, in which a committee of lawyers was appointed to revise that book, which was even in that day held to be an ancient authority. In that book we see that the legitimation of the children of a marriage, null *ob parentelam*, was secured by *bona fides;* and there is no doubt in my mind that the Canon law was the law of Scotland as to marriage and legitimation, at least as early as the time of the *Regiam Majestatem.*

Then your Lordships have the authority of Craig, who is said by Mr Jeffrey to be no authority at all, and to have been a foreign lawyer altogether; but Mr Gillies did not insist much upon that, after Mr Thomson had told us, what all of us knew, that he had merely studied abroad, like all other young men of his time, but had come home early, and practised here.

Another circumstance, however, is objected to Craig. He states the rule of the Canon law, and gives it as part of the law of Scotland; and it is argued on the part

* 1425, c. 54.

of the pursuer, that he does not shew us any case in his time to that effect; and also, that there has been no case since, and that therefore there is nothing in it but his own opinion. But who was this Craig, of whom they make so light? He was a man born before the Reformation, or just about that time. He must have been perfectly acquainted with the Judges of the old Consistorial courts; and also with those who filled the new Commissary courts. Is that no authority on the law of Scotland in such a matter —the opinion of a man who had the best opportunity of any writer in our law, of knowing what was thought by the Judges in both Courts as to those matters? If the question had been started for the first time by Stair or Bankton, I would have understood quite well that it might have been said that they knew nothing about it,—that it might have been their own private opinions, but that there was no evidence from their opinions as to what was the law of Scotland two hundred years before. In such a situation, this would have been a very good argument; but it does not apply to the case of Craig at all. He was well qualified to judge; and he lays it down, without the least hesitation, that it was the Canon law, and the law of Scotland in his time, as derived from the Canonists, that the *bona fides* of one of the parents was perfectly sufficient to bestow all the privileges of legitimacy on the child.

Then comes the opinion of Stair. He says only, to be sure, that so and so was the opinion of Craig in unison with the Canon law; but I must say this, at least, that, if Stair was of a different opinion, it was very unfair not to say so, and doubly unfair in him, for such was not his usual custom. I turned up last night this very chapter of Lord Stair, and found fifteen or twenty passages in which he mentions the opinion of Craig, and he never says any thing about

it, excepting where he differs from him. I turned up Erskine in the same way, and he follows the very same course. And I can very well understand why Stair and Erskine did not give their positive sanction to this opinion. Could they have said, This certainly will be followed as the law of Scotland, or, this must be followed as the law of Scotland? It would have been very presumptuous in them to have done so, when the question had never been tried. What could any man have said in a case that had never been decided? What but that so and so was the law of the Canonists, and that so and so was the opinion of Craig? That is all that they could have said, unless they had meant to dissent from it. At least, it is quite plain that Stair has not contradicted the opinion of Craig and the Canonists; and we have that opinion, without any contradiction by any of our writers, down to this day.

In this state the matter was found by our predecessors at the time of the case of Campbell and Cochrane. There was, in that case, no absolute necessity to determine the point, it is true, for this reason, that, though there was a child, there was nothing to succeed to. Mr Campbell had sold his heritable property, and he had given all that he had to give, to the child by his second wife, by his settlements. There was, therefore, no occasion to decide the question of legitimacy directly, but there was much reason to do it on the ground of analogy. In what we are now doing, we have no right to go into the question of marriage for the purpose of deciding that question; and yet the Judges, who have given their opinions for the pursuers, have all founded them expressly on the single ground of there having been no good marriage. In after times, it may be pleaded, that the opinions of your Lordships, in such a matter as this, were merely *obiter dicta*, and

not your opinions on the case actually before you. Would that be a fair account of the opinions of your Lordships? It was really something more than a decision of the Court that case of Carrick. I confess, I think, I never saw such a solemn adoption of any principle whatever by the Bench and the Bar in my life, as that of the legitimacy of the child, notwithstanding of the impediment in that case. Can your Lordships believe that the lawyers who argued it were so blind as not to see the bearing that the one point had upon the other? Is it possible to believe that it was unknown to the Bar at that time, that, if they could get the better of the legitimacy, they would have the better chance of success in their proof of the marriage? But they not only did not venture the argument, but the counsel whose business it was to dispute it, if it could have been disputed, conceded it to the other party as undoubted law.

If it is the law of Scotland, as it undoubtedly is, that even an act of Parliament may be abrogated by a contrary usage, I should think that such a general opinion,—such a universal adoption of the Canon law,—or of any other law, upon this point, would be enough to make it our law. Many other points of our law stand on much weaker grounds. I do not know where your Lordships will find any decision determining, that the eldest son is the heir of his father in heritage. It has never been called in question, and I do not believe that ever it was decided. That case has been followed by practice, for it is one which happens every day; but this case has not been acted on, for it does not occur every day.

What occasion had the minority, in the case of Campbell of Carrick, to express any opinion on this point, unless they had weighed it well. I cannot doubt that it was their deliberate opinion. And who were the minority? They were

President Forbes and Lord Arniston, two of the ablest men and greatest lawyers that ever sat upon this Bench. Why did they say any thing about it, if they had not considered it? It only weakened their own judgment, which they were maintaining on other grounds. What occasion had they to give that opinion? It was an *obiter dictum*, in one sense of the word, no doubt. It was not the point which they had then to determine. But it was the way by which they were to get at the decision. From the minority, it was something much stronger than an *obiter dictum*. A man may say something very weak, when he is arguing in favour of an opinion, because, rather than omit any thing, he will say many things not very important. But when he gives a *non obstante*,—when he says, in spite of so and so, still this is my opinion, I really cannot conceive how that can be called an *obiter dictum*.

I confess, my Lords, that I feel a great burden taken off my mind, when I find myself supported by all these old authorities; but, at the same time, I must repeat, that it is also my own opinion, and that I agree in every word which was said by Lords Glenlee and Meadowbank. I go farther:—I think there is a principle here that pervades all contracts. I conceive that it is not the child alone whose interest we have to consider. I conceive that the *bona fide* parent is materially interested. Has he no interest in having that child to succeed to him, and to the mother also? for we are all agreed that the effect of *bona fides* must be complete, or that it has no effect at all. I say that the principle here pervades all contracts whatever. A man who is *in bona fide*, is entitled to hold, by his contract, against every person who is *in dolo malo*. If any thing comes in the way, to prevent him from getting specific performance, *bona fides* will enable him to recover to the utmost farthing, against every one who is *in mala fide*.

In what I am now going to say, I wish to be considered as speaking *obiter*, for I am going to mention what I have not completely considered, but what has occurred to me from hearing the opinions of your Lordships. Suppose both of the parties had been alive, I say that the husband's *bona fides* would have given him a claim *ad id quod interest*, and that the lady would have been bound, to the utmost extent. I do not say what would have been the consequence, if she had had a child by her first husband; but, at least, no man claiming as her heir-at-law can break the contract, or found on her *dolus malus*. Not only from favour to the *bona fides*, but, in strict justice, this Court gives specific implement, when it can.

It now remains for me only to say one word as to the analogy of the law of England, though, if it had been different from the law of Scotland, I should not have been much moved by it; because, if, on any one point, the two laws are diametrically hostile to each other, it is on the subject of marriage and legitimacy. But I think they differ very little in reality, whatever they may do in form; and sure I am, that, if they do differ on the present question, it is not in regard to the principle of *bona fides* that they do so. The English have no objection to the principle being applied to illegal marriages. The only case pointed out, in which they refuse to apply it, is the case of precontract or previous marriage; for they admit that it does apply in other cases. They do not make the distinction on the ground of *bona fides*, but they do it on a distinction, founded altogether on some subtlety, for which I can see no good reason. If a man marries his own mother, knowing her to be so, the children are legitimate by the law of England. They say that it is because a second marriage is null, and an incestuous one is only voidable. That may do in England, where the distinction is received,

but it will not do in Scotland, where we have no such distinction between the two. We hold a marriage within the prohibited degrees to be as much null and void as the other, as is plain from what Erskine says on that head *.

In our law it is clear, that all illegal marriages are in the very same situation: they are all null, not what the English call voidable: therefore, we must either hold, that no marriage which is prohibited can legitimate the children, because they are all null; or, if it is admitted, as, according to the English law, it must, that the children of some prohibited marriages are legitimate, what are we to do? Are we to adopt the distinction of the law of England, between null and voidable? I conceive that there is no call on us to do so, till we see some reason assigned for it. I apprehend that there can be no doubt that I am entitled to take this liberty with the law of England, if I am to be governed by its analogies. Therefore, I am entitled to hold, from what I see of it, that, according to the law of England, a legal marriage is not essentially necessary to legitimacy; for they evidently hold the children of some illegal marriages to be legitimate; for, if they were not illegal, how could they set them aside?

I am, therefore, from the principles of our own law, reduced, by this rule of the English law, to the alternative of admitting the legitimacy of the children in all cases of illegal marriage, or of denying it in all; or of adopting the unknown distinction between null and voidable. But, in adopting any rule of a foreign law, we are only bound to adopt what may appear to us to be rational; and, I am quite clear, that, if we are to admit at all what the English lawyers admit, that the child of a voidable marriage may sometimes be legitimate, we ought to do it in all cases,

* B. I. tit. 4. sect. 7.

till it can be shewn that the distinction between an incestuous and a double marriage is any thing else than a mere legal, absurd, and useless subtlety.

And, in speaking of the law of England, I must really say that Sir Samuel Romilly, eminent as he is, does not appear to me to have considered this question very minutely, else he would have mentioned this distinction, when he was asked to point out any authorities bearing upon the case; for it is clearly made out that such a distinction exists. But I doubt, if, even an English judge, whatever may be their law, would have granted the pursuer's object, or would have entered into his argument. He asks a proof of the existence of the first marriage, with which, directly, he has no concern, in order to bastardize the issue of the second. Now, to determine what they would have done, in such a case, look to the case reported by Peere Williams. What did Lord Chancellor King do there? He refused to permit a proof of the first marriage, for the purpose of bastardizing the issue of the second marriage, after the death of one of the parties.

Therefore, whatever may be the law of England, I doubt very much if the pursuer would have attained his object under it. They refuse to try, incidentally, the validity of the first marriage, in order to bastardize the issue of the second. Is not this just what is sought from us here? Having, in ourselves, the whole power that the Lord Chancellor of England has, proof of the first marriage is asked, not to enable the first husband or the lady to get possession of their rights under it, but to enable the pursuer to bastardize the child of the second marriage. I say that I will not give him that proof; and I say, that I am warranted, in my refusal, even by the law of England, whatever may be the opinion of Sir Samuel Romilly. If he had been Chancellor, and had had to decide upon the case, he would

at least have known and attended to the decision reported by Peere Williams.

On the whole, then, even if I am to go into the law of England,—If it had been hostile to us, I would have disregarded it, on the very account of its difference in matters matrimonial from our law.—But, in so far as I can judge of it, it is with me in principle, and it is against me only on a distinction, which I never can adopt. The English have got at such a distinction. Where they got it I know not; but, if the rule is good as to the one class of marriages, I cannot perceive why it should not equally apply to the other.

This leads me to take notice of an act in the law of Scotland, which goes far to shew the opinion of our forefathers as to the value of the Canon law; and that they held it to be the law of Scotland, till it was altered by that act. I allude to the statute passed at the Reformation, decreeing that marriage should be as free as the law of God had made it *; which shews the sense of the Legislature at that time, that, in all matters matrimonial, not specially applicable to the Reformation, nor inconsistent with it, the Canon law continued to be the law of Scotland.

I have gone farther into this case, my Lords, than, I am sure, I should have done; because the same thing was much better said by my brethren. And I can only say, in concluding, that I regret very much, that, in such a case, we could not all be of one mind.

Lord Robertson.—A very few words in explanation are necessary from me, owing to a misapprehension of my speech. I gave my opinion *ex hypothesi* of there having been two marriages. We are bound, in this argument, to consider the lady as having been the wife of the first husband. I consider it as quite open to me yet, to form an opinion as to the validity of that marriage.

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* 1567, c. 15.

Lord NEWTON.—According to what I have heard to-day, even if the defender had been aware of the first marriage, the same opinion should have been entertained.

Lord JUSTICE-CLERK.—That would have put an end to all argument on *bona fides*.

Lord GLENLEE proposed, as a mode of reconciling the opinions of the Court, that the defences might be sustained on the specialty, that the action was brought by the pursuer, not to establish any right of his own, but to make out the bastardy of the defender. This suggestion was not adopted; and the following interlocutor was pronounced.

"19*th February* 1811.—The Lords having resumed "consideration of the cause, and heard counsel for the par- "ties, in their own presence, Before answer, appoint the "parties to put in Memorials, stating the arguments *hinc* "*inde*, on the question on which counsel were ordered to "be heard; and also, *separatim*, on the relevancy of the "several articles of the condescendence for the petitioner, "and answers thereto; and appoint said memorials to be "prepared and interchanged against the first box-day in "the ensuing vacation, and to be printed, boxed and mark- "ed, against the second box-day in said vacation, under an "amand of Forty Shillings Sterling for each party.

(Signed) "C. HOPE, *I. P. D.*"

Before the papers ordered by this interlocutor were lodged, the younger defender died; and the case was afterwards compromised by a division of the property, nearly in the proportion of one-third to the pursuer, and two-thirds to the defender.

APPENDIX.

APPENDIX

No. I.

CASE and OPINION by Sir SAMUEL ROMILLY, *read by Mr* JEFFREY *in the course of his Speech.*—Report, p. 32.

A was legally married to B, but did not assume his name, and during his (B's) absence, and while she knew him to be in life, she (A) was married to C. After A's death, C claims the rights of legitimacy for their (son A and C's) child, on the ground of his own ignorance of the prior marriage with B, who is still living.

Your opinion is requested, Whether the heir-at-law opposing this claim, is bound to prove *mala fides* on the part of C, and whether the *bona fides* of C, supposing it were true, be sufficient to legitimate the child born to him by A, notwithstanding A's prior and subsisting marriage, and the *mala fides* upon her part.—You are further requested to state your authorities, from whatever quarter they are collected.

I am clearly of opinion, that it is not incumbent on the heir-at-law to prove *mala fides* on the part of C, that is, that C had notice of the first marriage of A at the time of his own marriage with her; and I am as clearly of opinion, that, if it were established beyond the possibility of doubt, that C had not, at the time of his own marriage, any knowledge or suspicion of A's former marriage, yet the issue of A and C would be illegitimate.

I am not aware of any authority upon the point; and I have no doubt that no authority upon it can be found in the law of England, the matter being, as I conceive, according to the principles of our law, too clear to have been ever brought into controversy.

(Signed) SAMUEL ROMILLY.

LINCOLN'S INN,
Jan. 31. 1811.

No. II.

The following Notice, communicated by Mr Thomson after the report of his speech was thrown off, seems to afford material support to the view which he maintained relative to the adoption of the Canon law in the Scotch consistorial courts. The Official Book of the Diocese of St Andrew's, in which it was probably entered, has been lost; the oldest of those in the Register-Office commencing in 1543; and it is not known where Bishop Burnet saw the Bull which he refers to on the subject.

CASE of Margaret, *Queen Dowager of Scotland, and* Archibald, *Earl of* Angus, 1525.

Archibald, sixth Earl of Angus, was married to Margaret, Queen Dowager of Scotland, August 6. 1514: and by her had a daughter, Lady Margaret Douglas, born October 18. 1515, afterwards married to Matthew, fourth Earl of Lennox; whose eldest son, Henry, Lord Darnley, was the husband of Mary, Queen of Scots, and the progenitor of the present Royal family of England. The marriage of the Queen Dowager and the Earl of Angus was dissolved in the year 1525, by a sentence of the Archbishop of St Andrew's (James Bethon), on the ground of a pre-contract between Angus and a sister of the Lord Home; saving the legitimacy of the Lady Margaret Douglas, on the ground of the Queen Dowager's ignorance of this alleged impediment. Lesley, bishop of Ross, gives this account of the proceeding: "Aliquanto post, Regina Angusium in "jus vocari curat, coram Archiepiscopo Sanctandreapoli-"tano sistendum, ut illa de divortio controversia inter illos "verbis privatim sæpius disceptata, ad juris judiciique "formam ac præscriptum juste tandem dirimeretur. Ad "diem sistit Angusius: Reginæ illum fidem primariæ "fœminæ ante nuptias secum initas astrinxisse, accerrime "contendit. Sanctandreapolitanus divortii sententiam tu-

" lit; ea tamen lege, ut proles ex eo matrimonio suscepta, " propter parentis, saltem Reginæ ignorantiam, nihil inde " damni pateretur. Idque eo libentius, et quod res vide- " batur nulla dubitatione implicita, et quod Reginæ mens " in eam partem propendere videbatur."—*Lesl. de Reb. Scot. p.* 419.

Bishop Lesley's History, from the reign of James the Second, was originally written in the Scottish language, and afterwards translated into Latin, with alterations by himself. It was never printed; but it is preserved in manuscript. The passage of which the Latin version has been here quoted, is as follows:

" In the meyne tyme the Quene causit sommoun the " Erle of Angus, her husband, befoir the bischop of St " Androis, quhair thair wes ane proceis of divorce led be- " twix thame, and sentence pronouncit thairintill; the caus " thairof being, for that the Erle was first mariet with the " Lorde Humeis sister. The marriage with the Quene wes " found null and onlauchfull."

From a statement made by Bishop Burnet, it would appear, that the sentence of the Metropolitan was confirmed by a Papal Bull. In the summary of affairs before the Restoration, prefixed to his History, he says, " King Hen- " ry the Seventh's daughter, that was married to King " James the Fourth, did, after his death, marry Dowglas, " Earl of Angus; but they could not agree; so a precon- " tract was proved against him; upon which, by a sentence " from Rome, the marriage was voided, with a clause in " favour of the issue, since born under a marriage *de facto* " and *bona fide*. Lady Margaret Douglas was the child " so provided for. I did peruse the original Bull, confirm- " ing the divorce."—*Burnet's Own Times*, B. i. c. 19.

No. III.

The question discussed in the foregoing report was also considered by Dirleton and Stewart, and the view which they took of it seems to be worthy of notice. It is in Stewart's Answers to Dirleton, folio edition, page 199.

N. If a marriage be unlawful, and either of the parties be *in bona fide*, which doth legitimate the children; *Quæ-*

ritur, If these children will succeed with other children of lawful marriages; at least to their parents?

If they will succeed to their other kinsmen? Or, If the legitimation will only import that they are not *spurii*; and that they have *testamenti factionem?*

S. Though a marriage be unlawful, yet, if either of the parties be *in bona fide*, it should legitimate the children. And if once legitimate, they should succeed with the other children of a lawful marriage; for the legitimation should be *ad omnes effectus*; and even to succeed to the other kinsmen.

No. IV.

The following Notes of Lord MEADOWBANK's Opinion in the foregoing Case, are preserved in his Lordship's handwriting, in his collection of Session Papers.

Legitimacy by Birth, under Marriage, at least putative.

A case obviously of the greatest consequence,—and not more important than prolific in difficulties. We are called on to allow a proof of the ceremony of celebration of marriage, in order to bastardize the issue of one of the parties, under at least a putative marriage with another person, of which the celebration, followed by cohabitation till death intervened, without challenge by the other party to the alleged celebration, is acknowledged; and this attempt is now made, when this last party is still alive, is not amenable to our jurisdiction, either as party or as witness, and, for aught we know, may have formed alliances, as adverse to the alleged pre-contract as that of the deceased lady.

The law of all well governed countries is inimical to suffer the *status* of persons to be brought into question after their death. Their fame, even, and their fortune *, are held sacred from the effects of legal processes for delicts and improprieties.

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* Even irritancies of tailzies held (though not decided) to be unchallenge able after death.—A. M.

The law of England has been much relied on in this case. But it has not been observed, that (I quote Blackstone's words), "If the spiritual court do proceed to call a marriage in question after the death of either of the parties, "the courts of common law will prohibit, because it tends "to bastardize and disinherit the issue, who cannot so well "defend the marriage as the parties themselves when both "of them living, might have done?" *

Even the first husband could not then have now questioned the marriage, had the parties resided in his own country; and can it be permitted to the pursuer to question it here, under the most unfavourable circumstances, while that he, with so direct an interest, cannot even be made a party?

And here another great question occurs, which, even if the lady had been alive, and her first husband been pursuing, might have produced, in my opinion, the greatest difficulties. Consummation with him is not alleged. No semblance of cohabitation is pretended. But with the second husband, the ceremony is not only performed, but the most recognized and public matrimonial intercourse followed. I believe it is settled in the ecclesiastical law of Europe, that it is the *commixtio corporum* which is necessary to constitute the relations of affinity; and that powerful *nexus*, which is protected by the strongest sanctions of the civil and criminal law. This, therefore, is essential to the proper commencement of the *status*. The famous case of Katharine of Arragon, turned on the fact,—Was there, or was there not, a *commixtio corporum* with Prince Arthur, before her marriage with Henry VIII.; and does any of your Lordships think, that, without consummation with her first husband, this lady could have been tried either for adultery or bigamy? In such circumstances, your Lordships must certainly have hesitated to destroy an existing *status*, fully established, in order to give effect to a prior contract, which had never accomplished the commencement of that *status*, to which the law attaches its sanctions, and against which the *status* existing, seemed to form a final and fatal impediment †. Here divorce *pro salute animarum* is out of

* Vol. iii. p. 93.

† Blackstone holds it doubtful, whether pre-contract without consummation, forms an impediment, since 26th Geo. II. § 33. if reviving Henry VIII. c. 38.—A. M.

the question. The *salus animarum* rather is the other way.

I throw out these observations, that, in delivering my opinion on the only point at present discussed, it may be distinctly understood that I reserve myself open as to the questions I have alluded to, and that I think your Lordships ought to guard their being so reserved, in framing the judgment you pronounce.

The argument of the pursuer is, the alleged celebration of the first marriage renders the subsequent marriage absolutely void; and, of course, the children procreated, as well as every other effect of this nullity, must be unlawful. But granting that it were a sufficient ground to declare the marriage void, let us consider whether it be really true, that, after such a declarator were obtained, it, during its physical subsistence, produced no legal effects; that it was quite a legal nonentity, or an adulterous intercourse, though with innocence on the part of the second husband.

Blackstone, after Montesquieu, observes, that the principal end of marriage is ascertaining the paternity of children. Now, I ask, would the maxim, *Pater est quem nuptiæ demonstrant*, apply to the intercourse in question or not? Would not the *jus mariti* attach, and courtesy during the *bona fides*? I ask farther, Would reproaches against the parties as not a lawfully married pair have been punishable? Would parricide or incest by the children not have been punished as such? Would, in short, any violation of the duties towards them, as lawful married persons, have been punishable? Nay, would not their failure to one another in the duties of the relation they assumed, have been punishable? Would not divorce have been competent for their adulteries, and separation for maltreatment, had they been guilty of such vices?

The counsel for the pursuer have overlooked, in all their reasonings, that the possession of the *status personarum*, clothed in its legal forms, produces the most important legal effects, though that possession have been acquired without just right. The story of the slave Barbarius Philippus, that was consul, whether true or false, is a striking authority and illustration of this remark. So is that of Pope Joan; and, indeed, there cannot be a doubt that society would be most grossly injured, if error or imposture, when sanctioned by the requisite forms and authorities, should

prove fatal, when detected, to the relations and transactions which had arisen, or been accomplished, in a *bona fide* reliance on the firmness of the structure of political arrangements.

If an Archbishop or a Chancellor were to turn out to be a woman, it would be impossible to void the ordinations, judgments and mandates, which had proceeded from such impostors. If a Peer is detected to have been suppositious, the divisions carried by his vote cannot be undone. For the same reason, the consequences of a putative marriage must remain, though the marriage be dissolved or declared void.

It is said, *Quicunque scire debet conditionem ejus cum quo contrahit*, which is in other words just saying, that, in ordinary transactions, the law leaves it to every one to exercise his prudence against being deceived or mistaken in the persons he deals with. But, it is remarkable, that the law in the constitution of marriage, parentage, and the like, often takes more upon its own shoulders. The proclamation of banns,—the intervention of the priest,—the publicity of cohabitation, enter into the *status* of matrimony, besides the mutual confidence of the parties in each other's integrity; and in filiation and paternity, marriage forms the evidence and the security, as well as the acknowledgment of the parents. In short, the public is interested in the *status personarum*. It forms an essential part of the great mechanism of society. The machine, therefore, by the nature of it, must be sustained, because it must carry on perpetually its functions; and, therefore, the ordinary and natural consequences of the *status personarum* must result from possession, when attained with apparent regularity, although a latent *vitium* may exist, which may be detected and declared.

Now, here the second husband marries a lady in the *status* of a single unclaimed maiden. By this marriage, followed by open cohabitation without reproach, and the birth of the defender, the *status* of married persons is attained, with every effect for the time which any marriage could yield. The husband *in bona fide* is entitled to rely, not only on his own conscious integrity, and on the integrity of the lady he contracted with, but on having observed the precautions which the law deems sufficient for the security of society.

The circle they were known to, or associate with, recognise them as legally united, and the marriage terminates by the death of the lady, unclaimed by any former husband. Now, are all the invaluable interests reaped from this union, and among these, the principal crop or fruit of this *bona fide* possession, a lawful son and heir, to be destroyed and bastardized, because it is now discovered that the lady was not single, as she had appeared to be, but had been engaged by a private and unknown marriage. I confess freely, that, if that marriage was completed by consummation, and here I will hold it so, and she were alive, it would be a good and sufficient ground to annul her marriage with her second husband, and all subsquent intercourse would be adultery on his part, as well as hers. But this cannot vitiate his prior intercourse, or bastardize his child, engendered under every legal sanction, as born in wedlock, and belonging to society as invested with that character. I apprehend we are as little entitled to defeat interests thus lawfully obtained, as the Romans would have been to disregard the decrees of Barbarius Philippus, or disobey the laws passed at his *rogatio*. The rights of the first husband, and public example, and the *salus animæ* of the lady, might call for the voidance of the putative marriage. But justice to her second husband,—justice to his child, and the nature of human society, which sanctions marriage, demand, that the putative marriage, so long as it subsisted, should have every legal effect, so far as these parties are concerned, which any marriage could produce.

This opinion, resting on the doctrines of universal jurisprudence, obviously is independent of the distinction said to exist in the English law among marriages, dissoluble *a vinculo matrimonii* into null marriages, and voidable. I observe Blackstone states the law as if there were no such distinction; but if there be, it is plainly a peculiarity. For, if a child, begot *bona fide* in a putative marriage with an incestuous mother, is a lawful child, there is surely nothing in the nature of things, why a child begot *bona fide* in a putative marriage with a married woman should be a bastard; and I cannot help remarking, that the opinion of Sir Samuel Romilly, certainly highly respectable as that of a very eminent English lawyer is, I think, entitled to the less weight, that it over

looks the peculiarity of *quæstiones status*, which involve public as well as private interests, that must not only give many legal effects to mere putative marriages, but exclude the influence of personal objections, in barring the titles to pursue of those who had acquiesced in them. As *e. g.* Magdalene Cochrane, by her taciturnity and recognition of Mrs Campbell of Carrick for so many years.

But, if there is no logical necessity, from the impediment of a prior marriage, to destroy the effects of a putative after-marriage, more than from that of incest, then, is there any principle of morality or law which should bastardize the issue? None were assigned; expediency was talked of. But I doubt of the expediency, and though I did not, I have no idea of admitting it as a ground of abridging legal rights; and if putative marriages are to have any effects, surely that of maintaining the offspring in the *status* they got possession of at their birth, seems of all others the least questionable.

It is said the offspring at most should only be legitimate, *quoad* the succession and relationship of the *bona fide* parent. But, it is obvious, that the fair and just interest of the *bona fide* parent, extends to require a general legitimacy of the offspring; and a legitimacy in part, and illegitimacy in part, is what no principles of general jurisprudence could ever sanction or introduce; positive statute no doubt may. But, if putative marriages produce legitimacy, as the consequence of an existing though temporary state, to which the law has lent its sanction, it plainly must be a total legitimacy; for the innocent person engendered a child that he was entitled to trust should be wholly legitimate, and the child acquired the possession of a total legitimacy; and the subsequent declarator of voidance ought not to make void those rights acquired under the legal sanction of the political arrangements of society regularly formed.

After these general principles, very little need be said on the question, how the law of Scotland stands.

No sort of doubt, that the Canon law is one of the *fontes Juris Scotiæ*. You cannot open an institute of the law of Scotland without finding frequent references to it, not that it has a binding efficacy, except where it has been adopted. But if much of it has been adopted, on any particular branch of law, and in that very branch a question occurs

for determination, surely the doctrine of the Canon law on such branch, must have very great weight.

Now, your Lordships will observe, that, over all Europe, the *Curia Christianitatis* adopted, as far as they were permitted, the doctrines of the Canon law; and that with us questions of legitimacy fall directly within the cognizance of our *Curia Christianitatis* or Commissary Court, which is not the case in England; for there no action of bastardy or legitimacy can be entertained, although they have the proper jurisdiction in trying marriage, confined, however, to such trial during the lives of the parties. Accordingly, while in England, as to the important doctrine of *Legitimatio per subsequens matrimonium*, the Parliament of Merton, in the reign of Henry III., rejected the unanimous application of the bishops to adopt the laws of the Church on that subject; the Scotch, through the influence of that jurisdiction of the Commissaries, have, contrary to their more ancient law, which was the same with that of England, received the doctrines of the Church and Canon law on that subject. On the present question, therefore, whether a putative marriage legitimates the offspring, that law must be of great weight; and here we have the explicit and uncontradicted authority of Innocent III., who was not only an eminent lawyer, and an honour to the Pontifical Chair, but noted for his being, in some sort, the author of the ecclesiastical law of marriage, by converting it from a merely civil to also a religious contract. And, what seems to me most material, that this authority, as far as we can see, amalgamates with our ancient civil law as to putative marriage, voidable on account of impediments.

Then, we have the express authority of Craig, that it is the adopted law of Scotland, and none was more versant in the contemporary usages of his own country, as well as of the Continent.

Then we have Stair, who quotes Craig for the doctrine, and without intimating difference of opinion or doubt on the subject.

Further, we have Bankton quoting also Craig, and adding his approbation; and no wonder he did so, after witnessing, as he must have done, the unanimous opinion of the Court in the case of Campbell of Carrick, preserved by Lord Elchies. The Court was then filled with the

greatest lawyers and most distinguished ornaments of the Scottish bench, persons to whose superiority of attainments and intellect the great lawyers of my early days, Pitfour, Alemore, Braxfield, and Miller, bowed with reverence and submission. On that occasion, all the judges, though differing, on allowing a proof of the prior marriage alleged, agreed, that, under the public unchallenged cohabitation of the putative marriage, " Mrs Campbell has all the civil " rights of a lawful wife, and her children of lawful chil- " dren."

To these authorities, and to Erskine's recital of them, without intimating any difference of opinion, the authority of the custom of France, as given by D'Aguesseau with great force of expression must be added, a great nation, which like ourselves does not submit to the Canon law, but derives light and aid from it in cases of the same description with the present, and to all this mass of authority, nothing has been opposed on the other side, but the law of England, as announced by Sir Samuel Romilly, as to which I shall offer no farther remarks. I should have wished, however, from curiosity, to have learned from the same authority, whether, now that the alleged first marriage cannot be established in the direct jurisdiction, the civil courts would permit evidence of it to be received incidentally, to defeat the *status* of a child of a marriage which cannot itself be brought into question? If it can, it is an absurdity, *maxime evitanda, nunquam imitanda.*

So standing the authorities, I really do not think, that, though we were to differ on principles, there is any room to hesitate about the conclusion.

If any lawyer at the Bar were required to give an opinion, how the law of Scotland stood on the point, it is plain, that with Craig, Stair, Bankton, Erskine, and the unanimous *dictum* of the Bench, in the case of Carrick, and no adverse authority, I say it is clear how he *must* answer; and under such circumstances, I do not conceive that a Court, bound to apply, and interpret, and deduce, the law, by inference, but not authorized to invent law, is entitled to use more liberty with the law, than a chamber counsel stating how it is understood to stand. None of us can tell how many successions may have been regulated by Arniston, Elchies, Forbes, and Kilkerran's, declared opi-

nion, or by those of Craigie, Pitfour, Preston-grange, and the rest, who heard them. I do not believe your Lordships will think yourselves entitled to overturn a doctrine so highly sanctioned. I, at least, for one shall never be so presuming as to venture to question it.

To this opinion his Lordship has added the following note: "*I communicated the notes of my opinion to the Presi-*
"*dent*, who stated to me his entire coincidence in the views*
"*there taken, though, on the whole, he seemed to think the*
"*case attended with less difficulty than I had done. The*
"*Court divided; Polkemmet, Robertson, and Newton,*
"*against Glenlee, Justice-Clerk, and myself. Cullen un-*
"*well, so he did not attend the hearing in presence. The*
"*Court being equally divided order memorials.*"

(Signed) A. M.

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* Lord President Blair.

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